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No.

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

J. LEE HAVENS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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v.

J. LEE HAVENS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-9a) is reported at 592 F.2d 848.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 10a) was entered on April 5, 1979. A timely

petition for rehearing was denied on June 27, 1979 (App. C, *infra*, 11a-12a). Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including August 26, 1979 (App. D, *infra*, 13a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether evidence suppressed as the fruit of an unlawful search and seizure may nevertheless be used to impeach a defendant's false trial testimony, given in response to proper cross-examination, where the evidence does not squarely contradict the defendant's testimony on direct examination.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, respondent was convicted of possessing cocaine with intent to distribute it and of importing and conspiring to import cocaine, in violation of 21 U.S.C. 841(a)(1), 952(a), 960(a)(1), and 963 and 18 U.S.C. 2. He

was sentenced to three concurrent eight-year terms of imprisonment, to be followed by a special parole term of three years, and to a fine of $5,000.

The evidence showed that on October 2, 1977, respondent and John Kenneth McLeroth, both attorneys from Fort Wayne, Indiana, arrived at the Miami Airport on a flight from Lima, Peru (Tr. 14-16, 33-34, 54-56, 65-66, 340).[1] McLeroth underwent a customs search, which revealed 13 bags containing more than three pounds of cocaine sewed into 12 makeshift pockets in a T-shirt under his clothing (Tr. 15-24; Gov. Exhs. 1-3). He advised customs officials that respondent was travelling with him, and he implicated respondent in the importation of the cocaine (Tr. 31-34, 41-42, 48-49, 127). DEA agents then arrested respondent, who had already cleared customs (Tr. 53). Following the arrest, the agents searched respondent's luggage without a warrant. Inside the luggage, the agents found two medium-sized T-shirts. One of them had pieces cut out of it that corresponded to the pockets sewed into McLeroth's T-shirt (Tr. 386-389). Prior to trial the court suppressed the two T-shirts found in respondent's luggage on the ground that the search of the luggage violated respondent's Fourth Amendment rights.[2]

After pleading guilty, McLeroth testified for the government at respondent's trial. He discussed sev-

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[1] "Tr." refers to the transcript of the proceedings at trial.

[2] The government did not challenge the suppression order in the court of appeals, and we raise no issue here regarding its correctness.

eral trips that he and respondent had made to Peru.[3] He also testified that respondent had supplied him with the altered T-shirt (Tr. 112) and had sewn the pockets of the T-shirt to prevent the bags from falling out (Tr. 123-124).

Respondent testified in his own defense and denied any involvement in cocaine smuggling (Tr. 341-342, 348, 351, 375). He then testified as follows (Tr. 375):

> Q. And you heard Mr. McLeroth testify earlier as to something to the effect that this material was taped or draped around his body and so on, you heard that testimony?
>
> A. Yes, I did.
>
> Q. Did you ever engage in that kind of activity with Mr. McLeroth and Augusto or Mr. McLeroth and anyone else on that fourth visit to Lima, Peru?
>
> Q. I did not.

On cross-examination, respondent testified as follows (Tr. 383-384):

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[3] During the first trip, in April 1977, McLeroth had smuggled approximately four pounds of cocaine into the country, for which he received $15,000 from respondent (Tr. 89, 101-102, 111). In early June 1977, respondent made a second trip to Lima alone. Upon his return, respondent informed McLeroth that his connection in Lima "was very apprehensive and was not about to provide any further cocaine source at that time" (Tr. 105). The third trip, in early September 1977, was unsuccessful because the "source" in Lima had been arrested (Tr. 114-116). The fourth trip ended with respondent's arrest.

> Q. Now, on direct examination, sir, you testified that on the fourth trip you had absolutely nothing to do with the wrapping of any bandages or tee shirts or anything involving Mr. McLeroth, is that correct?
>
> A. I don't—I said I had nothing to do with any wrapping or bandages or anything, yes. I had nothing to do with anything with Mr. McLeroth in connection with this cocaine matter.
>
> * * * * *
>
> Q. And your testimony is that you had nothing to do with the sewing of the cotton swatches to make pockets on the tee shirt?
>
> A. Absolutely not.
>
> Q. Sir, when you came through Customs, the Miami International Airport, on October 2, 1977, did you have in your suitcase Size 38-40 medium tee shirts?

Defense counsel objected to this question (Tr. 385), but, after some discussion, the court overruled the objection and permitted the prosecutor to pursue that line of questioning, which continued as follows (Tr. 404):

> Q. On that day, sir, did you have in your luggage a Size 38-40 medium man's tee shirt with swatches of clothing missing from the tail of the tee shirt?
>
> A. Not to my knowledge.
>
> * * * * *
>
> Q. Mr. Havens, I'm going to hand you what is Government's Exhibit 9 for identification

and ask you if this tee shirt was in your luggage on October 2nd, 1975 [*sic*]?

A. Not to my knowledge. No.

Respondent further denied having told a DEA agent that the T-shirts found in his suitcase belonged to McLeroth (Tr. 405-406). On rebuttal the government called the agent, who testified that he had found two T-shirts, including Government Exhibit 9, in respondent's suitcase and that respondent had stated that they belonged to McLeroth (Tr. 439-441).

Relying primarily on *Agnello* v. *United States*, 269 U.S. 20 (1925), and *Walder* v. *United States*, 347 U.S. 62 (1954), the court of appeals reversed respondent's conviction. The court stated that those cases require that illegally seized evidence may be used for impeachment only if the predicate for its use in impeachment is found in the defendant's direct examination and only if the evidence contradicts a particular statement made by the defendant (App. A, *infra*, 6a-7a). Applying these principles, the court held that since respondent was not asked and did not testify about the T-shirt or the contents of his luggage until cross-examination, this case "falls squarely within" this Court's decision in *Agnello*, and the evidence was not admissible even for the limited purpose of impeachment (App. A, *infra*, 9a).

REASONS FOR GRANTING THE PETITION

1. This case presents an important and recurring question concerning the circumstances in which illegally seized evidence may be used to impeach a

defendant's false testimony at trial. The court of appeals held that *Agnello* v. *United States*, *supra*, prohibits the use of illegally obtained evidence for impeachment except where the evidence specifically contradicts particular statements made during the defendant's direct testimony. Its approach of distinguishing between direct and cross-examination testimony is in accord with decisions in three other courts of appeals.[4] However, these decisions are inconsistent with the decisions of this Court in *Harris* v. *New York*, 401 U.S. 222 (1971), and *Oregon* v. *Hass*, 420 U.S. 714 (1975), and their effect is to limit severely the ability of the prosecution to cross-examine defendants effectively, by giving defendants a license to commit perjury without fear of impeachment.

The facts of the instant case illustrate the serious obstacles to bringing out the truth on cross-examination that are inherent in broadly applying the exclusionary rule whenever the defendant's direct testimony is not precisely contrary to the implications of the tainted evidence. Here, the respondent, an at-

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[4] *United States* v. *Hickey*, 596 F.2d 1082 (1st Cir. 1979); *United States* v. *Whitson*, 587 F.2d 948 (9th Cir. 1978); *United States* v. *Mariani*, 539 F.2d 915 (2d Cir. 1976); *United States* v. *Trejo*, 501 F.2d 138, 145 (9th Cir. 1974) (dictum); see also *State* v. *Kidd*, 281 Md. 32, 375 A.2d 1105, cert. denied, 434 U.S. 1002 (1977); *People* v. *Taylor*, 8 Cal. 3d 174, 501 P.2d 918, 104 Cal. Rptr. 350 (1972), cert. denied, 414 U.S. 863 (1973); *People* v. *Rahming*, 26 N.Y.2d 411, 259 N.E.2d 727, 311 N.Y.S.2d 292 (1970); but see *United States* v. *Cervantes*, 542 F.2d 773 (9th Cir. 1976).

torney who was aware that the T-shirts had been suppressed, tailored his testimony carefully to avoid specific mention of the T-shirts. Yet by testifying that he had nothing to do with the draping of material around McLeroth's body or "that kind of activity" on the fourth visit to Peru, the respondent certainly left the impression with the jury that, contrary to McLeroth's testimony, he had nothing to do with preparing the T-shirt for use in the smuggling attempt. A proper and obvious line of cross-examination was to ask the respondent about his connection with the T-shirt. Moreover, McLeroth had already testified concerning the respondent's role in preparing the T-shirt, so this line of cross-examination cannot be said to have itself been a "fruit" of the illegal search. Nor can it be considered an attempt to "smuggle in" tainted evidence by means of cross-examination only remotely connected to the defendant's direct testimony. See *Walder*, *supra*, 347 U.S. at 66.

Under the decision of the court of appeals, however, respondent was free to perjure himself in response to the cross-examination without fear of impeachment by the evidence in the possession of the government. Under this approach, defendants, being aware of the suppressed evidence, will be able to tailor false defenses to avoid impeachment, thus frustrating the truth-seeking function of a trial. See *Doyle* v. *Ohio*, 426 U.S. 610, 617 n.7 (1976). The instant case is a classic example of the use of the exclusionary rule, not as a shield, but as "a license

to use perjury by way of a defense." *Harris* v. *New York*, *supra*, 401 U.S. at 226; *Oregon* v. *Hass*, *supra*, 420 U.S. at 722.

The court of appeals in this case relied on *Agnello* to support this result, but the rationale on which *Agnello* rests has been repudiated by this Court. In that case, the defendant was indicted for conspiracy to sell a package of cocaine. He denied committing the offense, and, on cross-examination, he denied ever having seen cocaine before. The government was then permitted to introduce in rebuttal a can of cocaine found in the defendant's bedroom pursuant to an illegal search. The Court reversed, stating that the essence of the exclusionary rule was that illegally seized evidence "not be used at all." 269 U.S. at 35. In *Walder* v. *United States*, *supra*, the defendant testified on direct that he had never possessed narcotics, and the Court held that it was proper for the government to introduce for impeachment purposes narcotics that had been unlawfully seized from the defendant a few years earlier. Because *Walder* involved an unusual situation, where the defendant volunteered false testimony on direct that was not necessary to his defense, the holding was not inconsistent with the result in *Agnello*. The Court noted this point, stating that in *Agnello* the prosecution had attempted to "smuggle in" tainted evidence on cross-examination. 347 U.S. at 66. Contrary to the apparent conclusion of the court below (App. A, *infra*, 5a-7a), however, this explanation does not support its decision here; since respondent gave false answers to cross-examination questions

properly within the scope of direct, the tainted evidence was not "smuggled in."

In *Harris* v. *New York*, *supra*, the Court went well beyond the narrow holding of *Walder* and permitted the use of suppressed evidence to impeach false testimony bearing directly on the crimes charged. Moreover, the Court flatly repudiated the rationale relied upon in *Agnello* that illegally obtained evidence must be completely excluded from trial. It stated that the establishment of an exclusionary rule for statements obtained in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), did not imply that "evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes." 401 U.S. at 224. The Court further explained that the deterrence rationale of the exclusionary rule is satisfied when the evidence is made unavailable in the prosecution's case in chief. 401 U.S. at 225. The Court went on to point out the importance of the impeachment evidence in aiding the jury in finding the truth, cautioning that the privilege of a defendant to testify "cannot be construed to include the right to commit perjury." *Ibid.* These principles were reiterated in *Oregon* v. *Hass*, 420 U.S. 714, 722 (1975). Nonetheless, because *Harris* and *Hass* did not expressly limit it, the court of appeals stated that *Agnello* was not in conflict with those decisions (App. A, *infra*, 5a) and felt compelled to follow it.[5]

[5] In fact, *Agnello* is still sometimes cited for "the basic proposition that illegally obtained evidence may not be used in a criminal trial." See *United States* v. *Whitson*, *supra*, 587 F.2d at 951.

Moreover, the Court has ruled in many other contexts that the exclusionary rule is not to be applied in all cases and has established the principle that its application is to be "restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974). In accordance with this principle, the Court has declined to apply the exclusionary rule in a variety of contexts in which the deterrent effect of exclusion on police misconduct does not outweigh the cost to society that would result from excluding the evidence. See, *e.g.*, *United States* v. *Ceccolini*, 435 U.S. 268, 279-280 (1978); *Stone* v. *Powell*, 428 U.S. 465, 489-491 (1976); *United States* v. *Janis*, 428 U.S. 433, 448-454 (1976); *United States* v. *Calandra*, *supra*. In each of these cases this Court has recognized the dispositive factor to be the degree of additional deterrence that suppression could be expected to provide in the particular circumstances.[6]

It is the duty of the courts to balance the serious restriction on cross-examination and associated interference with the truth-seeking function of the jury against the deterrence benefit to be gained from ap-

[6] A similar analysis underlies decisions declining to apply the exclusionary rule retroactively (see, *e.g.*, *United States* v. *Peltier*, 422 U.S. 531, 536-539 (1975); *Desist* v. *United States*, 394 U.S. 244, 254 n.24 (1969)), and decisions denying "standing" to persons who were not themselves the victims of unconstitutional searches. See, *e.g.*, *Rakas* v. *Illinois*, No. 77-5781 (Dec. 5, 1978), slip op. 5-7; *Brown* v. *States*, 411 U.S. 223, 229 (1973); *Alderman* v. *United States*, 394 U.S. 165, 174-175 (1969).

plying the exclusionary rule in that limited number of cases where the defendant takes the stand and gives false answers in response to proper cross-examination questions. This Court has already suggested how that balance should be struck. It has stated that sufficient deterrence flows when the evidence cannot be used in the prosecution's case in chief.[7] *Harris, supra*, 401 U.S. at 225. *Harris, Hass*, and *Walder* each involved impeachment of a defendant's direct testimony with tainted evidence, but there is nothing in those decisions that limits the principles laid down there to impeachment of false testimony on direct examination. In each of those cases this Court made it clear that the primary concern is the avoidance of the perversion of the truthfinding function by permitting a defendant's false testimony to go unchallenged. False testimony during cross-examination is no less insidious than false testimony during a defendant's direct testimony. When a defendant voluntarily takes the stand, he is "under an obligation to speak truthfully and accurately," 401 U.S. at 225, both on direct and on cross-examination. "Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are

[7] Moreover, the evidence would be admissible only for the limited purpose of impeaching the defendant's credibility. The ability to impeach cross-examination testimony in addition to direct testimony cannot significantly increase what is only a "speculative possibility" that illegal searches will be encouraged. *Harris, supra*, 401 U.S. at 225.

therefore imperative." *United States* v. *Mandujano*, 425 U.S. 564, 576 (1976) (plurality opinion).

Considering that little if any incremental deterrence of illegal searches and seizures can reasonably be anticipated from a rule barring impeachment use of illegally seized evidence, the courts should be free to discourage perjury by permitting false answers to proper cross-examination to be impeached by otherwise suppressed evidence.[8] Yet until this Court expresses a view on the continuing vitality of *Agnello*, the lower courts will apparently continue to feel bound by the holding in that case to apply the exclusionary rule in all cases where the tainted evidence does not directly contradict the defendant's direct testimony. Thus, despite what we take to be the clear import of *Harris*, the courts of appeals generally have not engaged in a detailed analysis of the merits of applying the exclusionary rule in a situation where perjured testimony is permitted to go unrefuted although evidence of the perjury exists. Indeed, the court of appeals in this case did not even advert to the problem of allowing perjured testimony to go unchallenged.

[8] This rule does not impinge upon the defendant's right to testify in his own behalf. That right is simply "the right to testify truthfully * * *. There is no protected right to commit perjury." *United States* v. *Grayson*, 438 U.S. 41, 54 (1978). To the extent that the possibility of impeachment may have "any chilling effect on a defendant's decision to testify falsely, that effect is entirely permissible." 438 U.S. at 54. The fact that the impeachment may relate to matters brought out on cross-examination is a consequence of the defendant's decision to take the stand, which carries with it the obligation to respond to cross-examination. See *McGautha* v. *California*, 402 U.S. 183, 215 (1971).

Because *Agnello* has never been explicitly limited by this Court, the lower courts have generally felt compelled to limit impeachment to perjury on direct testimony,[9] even though some judges have expressed their misgivings about the rule. Thus, the First Circuit recently stated:

> At least without further guidance from the Supreme Court, we feel bound to join these courts in holding that suppressed evidence may not be used to impeach statements elicited from a defendant on cross-examination, where the defendant has not testified as to the subject matter of the suppressed evidence in his direct examination. * * *
>
> The foregoing analysis may seem artificial, to be sure. It can be criticized as allowing a defendant to lie safely on cross-examination but not on direct. But it is the rule that best reconciles *Agnello* with the *Harris* line of authority, and it is a reasonable way to minimize any incentive for the government to secure evidence illegally.

United States v. *Hickey*, 596 F.2d 1082, 1088 (1st Cir. 1979).[10] The Court should grant review here in

[9] In fact, this limitation ascribed to *Agnello* has even been applied beyond its limited area of the exclusion of illegally obtained evidence. In *United States* v. *Pantone*, No. 78-1123 (3d Cir. July 19, 1979), the court, relying on *Agnello*, held that "other crimes" evidence, which would have been admissible under Rule 404 of the Federal Rules of Evidence to impeach direct testimony, could not be introduced to impeach a defendant's false testimony on cross-examination. Slip op. 12-13.

[10] See also Judge Kilkenny's statement that "[i]t is wholly illogical to hold that a defendant may not hide beyond the shield of the *Miranda* rule if he perjures himself on direct examination, but may invoke the protection of *Miranda* if he perjures himself on the same subject matter on cross-examination." *United States* v. *Whitson*, *supra*, 587 F.2d at 953 (Kilkenny, J., concurring and dissenting).

order to provide that guidance. Rather than forcing courts to seek the "best reconciliation" of *Agnello* and *Harris*, whose underlying rationales are fundamentally inconsistent, a principled examination should be given to the propriety of applying the exclusionary rule to exclude impeachment by illegally obtained evidence.

2. The fundamental legal issue presented by this case is whether a distinction should be drawn between false testimony on direct examination and false testimony in response to proper cross-examination in deciding whether to admit illegally seized evidence for the purpose of impeachment. The courts of appeals have held that *Agnello* v. *United States*, *supra*, requires such a distinction, and we contend that this distinction is unsound and that *Agnello* should be limited or overruled. This case also presents a subsidiary issue of considerable practical importance. We believe that, even if *Agnello* is held to have continuing vitality for purposes of barring use of illegally seized evidence to impeach false answers regarding subjects truly brought up for the first time on cross-examination, this case was wrongly decided because of the scope of respondent's direct testimony.

Here, by clear implication, albeit not explicitly, respondent's direct testimony denied any role in arranging the means to be used for the smuggling

attempt. If such direct testimony is not deemed sufficient under *Walder* to justify impeachment by means of illegally seized evidence, then *Walder* is little more than a holding limited to its rather unusual and non-recurring facts. Defendants will have little difficulty in tailoring their direct testimony to suggest the truth of a proposition contradicted by the suppressed evidence while making no specific statement that can be squarely contradicted by that evidence. Surely, the prohibition in *Walder* against "letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility," 347 U.S. at 65, was not meant to be limited solely to cases where the suppressed evidence squarely contradicts a particular statement of the defendant. If it is so limited, the threat of impeachment by means of suppressed evidence will not deter defendants from testifying falsely on direct examination—they will just be required to proceed more carefully in tailoring their false testimony. Under the result reached by the court of appeals, they will enjoy exceptionally broad latitude in this endeavor.

The cases decided by other courts of appeals have not involved such extensive direct testimony, and it is questionable whether those courts would find it appropriate to read *Agnello* as broadly as did the court of appeals in this case. The language of those decisions suggests that those courts would apply the *Agnello* rule only when the cross-examination opens up an entirely new subject matter, and that they

would have permitted impeachment in this case. In *United States* v. *Whitson*, 587 F.2d 948, 952 (9th Cir. 1978), the court noted that the defendant did not raise the issue on direct and stated that the weight of authority was that tainted evidence could not be used to impeach "on a matter not opened by the defendant." In *United States* v. *Mariani*, 539 F.2d 915, 924 (2d Cir. 1976), the court relied on the lack of a "nexus" between the direct examination and the cross-examination.

The Court should grant review in this case to reexamine *Agnello* and expressly decide whether it should be overruled or, alternatively, to what extent it should be limited in light of *Harris* and *Hass*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1979

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78-5411

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

J. LEE HAVENS, DEFENDANT-APPELLANT

April 5, 1979

Appeal from the United States District Court for the Southern District of Florida.

Before WISDOM, GOLDBERG and VANCE, Circuit Judges.

VANCE, Circuit Judge:

J. Lee Havens was convicted of conspiring to import cocaine into the United States,[1] of importing approximately 1490 grams of cocaine into the United States,[2] and of knowingly and intentionally possessing with intent to distribute approximately 1490 grams of cocaine.[3] He received three concurrent eight-year sentences and a fine of $5,000. His appeal to this court challenges the lower court's ruling allowing the

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[1] In violation of 21 U.S.C. §§ 952(a), 960(a)(1), and 963.

[2] In violation of 21 U.S.C. §§ 952(a), 960(a)(1), and 18 U.S.C. § 2.

[3] In violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2.

introduction of suppressed evidence.[4] We reverse the judgment of conviction and remand for a new trial.

On October 2, 1977, Havens and John Kenneth McLeroth, both of whom were lawyers from Fort Wayne, Indiana, arrived at the Miami International Airport on a flight from Peru. Customs Officer William Percival searched McLeroth and found cocaine sewed into makeshift pockets in a T-shirt under his clothing. McLeroth told the investigating officers that Havens was traveling with him and implicated Havens in the importation of the cocaine. D.E.A. agents arrested Havens, who had cleared Customs approximately four hours earlier, searched him, and seized and searched his luggage without a warrant. No controlled substance was found. A T-shirt was found, however, from which pieces were cut that corresponded to the pockets sewed to McLeroth's T-shirt. On motion by Havens prior to trial, the T-shirt and other evidence seized during the search of Havens' suitcase were suppressed.

McLeroth was charged along with Havens in the three-count indictment. Immediately before trial McLeroth changed his plea and pleaded guilty to one count of the indictment in exchange for dismissal of two remaining counts. During Havens' trial he testified that he, Havens and other persons were engaged in a scheme to import cocaine into the United States.

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[4] Havens' contention that the evidence was insufficient is clearly without merit. We do not treat his other contentions because they involve rulings on matters that are not likely to recur upon retrial of his case.

He claimed that because he needed money desperately he had agreed to become a "mule" and to smuggle cocaine into the United States for Havens.

Havens denied involvement with the cocaine and claimed that he had visited Peru on legitimate business. On direct examination by his own counsel and after he had denied involvement in the importation of the cocaine, Havens was questioned and responded as follows:

> Q. And you heard Mr. McLeroth testify earlier as to something to the effect that this material was taped or draped around his body and so on, you heard that testimony?
>
> A. Yes, I did.
>
> Q. Did you ever engage in that kind of activity with Mr. McLeroth and Augusto or Mr. McLeroth and anyone else on that fourth visit to Lima, Peru?
>
> A. I did not.

On cross-examination the prosecutor asked the following questions with the indicated answers:

> Q. Now, on direct examination, sir, you testified on the fourth trip you had absolutely nothing to do with the wrapping of any bandages or tee shirts or anything involving Mr. McLeroth; is that correct?
>
> A. I don't . . . I said I had nothing to do with any wrapping or bandages or anything, yes. I had nothing to do with anything with McLeroth in connection with this cocaine matter.

* * * *

Q. And your testimony is that you had nothing to do with the sewing of the cotton swatches to make pockets on that tee shirt?

A. Absolutely not.

Q. Sir, when you came through Customs, the Miami International Airport, on October 2, 1977, did you have in your suitcase Size 38-40 medium tee shirts?

At this point the jury was excused and a discussion between the court and counsel ensued with respect to the admissibility of this line of questions. The court ultimately ruled that the interrogation would be allowed. Havens was then asked,

Q. Mr. Havens, I'm going to hand you what is Government's Exhibit 9 for identification and ask you if this tee shirt was in your luggage on October 2nd, 1975 [*sic*]?

A. Not to my knowledge. No.

After defendant rested, Customs Agent Martinez was recalled as a rebuttal witness. The trial court previously had ruled that if Havens admitted on cross-examination that the T-shirt was in his luggage, it could not be introduced into evidence. Because he denied it, Martinez was allowed to testify that the T-shirt was found in Havens' suitcase. Over objection the T-shirt was then received into evidence.

The government argues that introduction of the challenged evidence for impeachment purposes is supported by *Walder* v. *United States*, 347 U.S. 62 (1954), and its progeny, *Harris* v. *New York*, 401 U.S. 222 (1971), and *Oregon* v. *Hass*, 420 U.S. 714 (1975). In *Walder* the Supreme Court approved the

introduction into evidence of illegally seized heroin for the purpose of impeaching the defendant's direct testimony that he had never possessed narcotics. *Harris* allowed the impeachment of defendant's direct testimony by a prior inconsistent statement not obtained in conformity with *Miranda* v. *Arizona*, 384 U.S. 436 (1966). In *Oregon* v. *Hass*, *supra*, the court similarly allowed impeachment with a prior statement obtained by law enforcement officers after the defendant had requested an attorney. In all three cases the challenged evidence contradicted direct testimony given by defendant in his own defense.

This line of authority is now well ingrained in our jurisprudence. Its policy is stated in *Walder*:

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the Weeks doctrine would be a perversion of the Fourth Amendment.

347 U.S. at 65. These cases should not be read, however, as being in conflict with *Agnello* v. *United States*, 269 U.S. 20 (1925). Indeed, the *Walder* court took pains to distinguish the facts before it by pointing out that in *Agnello* the basis of the contradiction was elicited on cross-examination of the defendant.

Agnello testified on direct examination that he had received certain packages from a co-defendant, but that he did not know their contents and would not have carried them if he had known they contained narcotics. On cross-examination he said that he had never seen narcotics. At that point, over his objection, the prosecutor produced a can of cocaine which had been seized in his bedroom and asked him if he had ever seen it. After he denied having seen it, the government was allowed to introduce into evidence the can of cocaine that was the product of an illegal search and previously had been excluded.

In reversing Agnello's conviction the Supreme Court held,

> And the contention that the evidence of the search and seizure was admissible in rebuttal is without merit. In his direct examination, Agnello was not asked and did not testify concerning the can of cocaine. In cross-examination, in answer to a question permitted over his objection, he said he had never seen it. He did nothing to waive his constitutional protection or to justify cross-examination in respect of the evidence claimed to have been obtained by the search.

269 U.S. at 35.

From the *Agnello-Walder* framework, two requirements emerge that bear on the admissibility of the otherwise illegal evidence received against Havens. First, the predicate for its use in impeachment must be found in the direct examination of the defendant. It cannot be smuggled into evidence by the prosecutor

on cross-examination. Second, the evidence in question must contradict a particular statement made by the defendant. An arguable conflict with a simple denial of guilt does not meet this test. In *Walder* the court said,

> [T]he Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief. Beyond that, however, there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility.

347 U.S. at 65 (footnote omitted).

The second requirement is demonstrated by two recent cases involving the interplay of the *Agnello-Walder* holdings under similar facts. In both *United States* v. *Mariani*, 539 F.2d 915 (2d Cir. 1976), and *United States* v. *Trejo*, 501 F.2d 138 (9th Cir. 1974), the defendant took the stand, denied guilt, and testified generally in respect to his version of the facts. In neither case did the defendant testify about the particular object that had been illegally seized until the testimony was elicited from him on cross-examination. Both courts concluded that receipt of the questioned evidence for impeachment purposes constituted error.

In the present case the controlling rule was obviously misunderstood by the trial judge. The colloquy

between the defense counsel and the court, during which the complained of rulings were made, included the following:

> MR. McCAIN: How can he be impeached, Your Honor, if it was not covered on direct, whether or not he had—
>
> THE COURT: It does not have to be covered on direct. If he denies something under oath, which is—

According to the view of the trial judge and the prosecutor, defendant could be asked on cross-examination a question, which answered affirmatively would admit the incriminating tendencies of the illegal evidence, and, answered negatively would allow the subsequent introduction of the illegal evidence for purposes of impeachment. Such a view extends beyond the reach of *Walder*, *Harris* and *Hass*.

Alternatively, the government now argues that even if the stated basis for the trial court's ruling was incorrect there still was no error. It contends that Havens' impeachment was amply justified by his testimony on direct. Our understanding of the record will not support such a conclusion.

McLeroth testified that on his first trip to Peru he brought back cocaine draped over his body and secured by tape and an ace bandage. Utilization of the T-shirt on subsequent trips was intended to be an improvement. McLeroth first mentioned it in connection with a second trip that proved fruitless because no cocaine could be obtained. According to McLeroth, the pocketed T-shirt was fabricated in the

United States and used to carry the "buy" money to Peru.

On direct examination Havens was not asked whether he possessed the incriminating T-shirt at the time he entered the United States or at any other time. His own counsel did not ask Havens anything at all about a T-shirt, nor was he asked about the contents of his luggage. He was first questioned along these lines during cross-examination and all the impeachment evidence was calculated to contradict testimony given by Havens on cross-examination.

The question before us falls squarely within the Supreme Court's ruling in *Agnello*. The trial court's contrary ruling necessitates reversal of Havens' conviction.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-5411

D. C. Docket No. 77-479-CR-JLK

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

versus

J. LEE HAVENS, DEFENDANT-APPELLANT.

Appeal from the United States District Court for the Southern District of Florida

Before WISDOM, GOLDBERG and VANCE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

April 5, 1979

ISSUED AS MANDATE: Jul 5 1979

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-5411

[Filed June 27, 1979]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

J. LEE HAVENS, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

(Opinion 4-5-79, 5 Cir., 197—, —— F.2d ——).

(June 27, 1979)

Before WISDOM, GOLDBERG and VANCE, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court

be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Robert S. Vance
United States Circuit Judge

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-63

UNITED STATES, PETITIONER

v.

J. LEE HAVENS

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the appplication of counsel for petitioner(xx),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 26, 1979.

/s/ Lewis F. Powell, Jr.
LEWIS F. POWELL, JR.
Associate Justice of the
Supreme Court of the
United States

Dated this 20th
day of July, 1979.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 299388 57

Supreme Court, U. S.
FILED
JAN 10 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-305

UNITED STATES OF AMERICA,

Petitioner

—*v.*—

J. LEE HAVENS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 24, 1979
CERTIORARI GRANTED NOVEMBER 26, 1979

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-305

UNITED STATES OF AMERICA,
Petitioner

—*v.*—

J. LEE HAVENS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

No. 77-479-CR-JLK

UNITED STATES OF AMERICA

v.

J. LEE HAVENS

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
10-3-77	Complaint Filed
10-19-77	Indictment
12-15-77	Motion to Suppress Evidence
1-23-78	Government's Memorandum of Law Re: Defendant's Motion to Suppress
1-25-79	Findings of Fact And Recommendation of Magistrate. Recom: Deft. Motion to Suppress be Granted as to Items Seized as the Result of Search of Luggage; Denied as to Items Seized During Search of Person.
1-30-79	Transcript of Hearing of 1-18-79 at 2:00 p.m. before Magistrate Shapiro.
2-6-78	Criminal Jury Trial Commenced Jury Empaneled. 2-9-78 Criminal Jury Trial. 2-10-78 Continued and Concluded. Verdict: Guilty as to each of Counts 1, 2, 3. Defendant Adjudged Guilty.
4-3-78	Defendant Sentenced
4-3-78	Notice of Appeal Filed.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-5411

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

J. LEE HAVENS, DEFENDANT-APPELLANT

DATE	PROCEEDINGS
6-10-78	Certified Record Filed
6-11-78	Cause Docketed
4-5-79	Judgment of the District Court Reversed (Wisdom, Goldberg and Vance, JJ.)
6-1-79	Petition for Rehearing With Suggestion for Rehearing *En Banc.*
6-27-79	Petition for Rehearing Denied; Petition for Rehearing *En Banc* is denied.

RELEVANT PORTIONS OF TRIAL TRANSCRIPT

[14] Thereupon:

WILLIAM J. PERCIVAL

was called as a witness on behalf of the Government who, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MILLER:

Q. By whom are you employed, sir?
A. U.S. Customs.
Q. And, tell us, please, your educational-professional experience.
Excuse me—
A. I'm a retired—
Q. —for the record, state for the record, and the jury, your name.
A. William J. Percival. I'm a retired Army officer and I have been employed with Customs seven years.
Q. And, in what capacity are you employed by Customs, sir?
A. I'm a Customs Patrol Officer.
Q. Now, Mr. Percival, were you employed by Customs on October 7, 1977?
A. October the 7th?
[15] Q. Second.
A. Yes, sir.
Q. Tell us what, if anything, happened on that day?
A. On October the 7th, I was standing in Customs; we wear civilian clothes; we're armed, but we have the same authorities as Customs Inspectors.
I was observing the baggage coming up the carousel from Braniff 974.
Q. By the way, where was this, sir? Is this at Miami International Airport?
A. Yes, sir. Yes.

Q. Please go ahead.
A. —we observed passengers, et cetera.
So, I saw a gentleman that was dressed in a suit, who definitely had bulges in his lower abdomen and his side area.
I had a partner working with me; I pointed out this gentleman to my partner.
He observed when the gentleman bent over, he also had bulges in his back when he sent to pick up his luggage.
After the gentleman had gone through Customs, prior to exiting, we stopped the gentleman; [16] introduced ourselves as Customs officers; he told us his name was Mr. McLeroth.
We told him why we stopped him. We requested him to come back to a search room we have there in the Customs area.
When we arrived there we told him the reason he was brought back for a secondary was a bulge in his lower abdomen area.
We asked him if he was carrying a cast or a body brace.
He said, "No."
So, we asked him to drop his trousers and his underwear, and we observed that he still had some sort of underwear on.
Q. Is this normal procedure for Customs?
A. For this, this is our job; yes, sir, for secondary inspections.
Q. Okay.
A. Under the underwear he still had on, we could still see he had bulges, so we asked him to remove whatever that was and put it on the table.
He said he couldn't without taking off his clothes. So, we had him go ahead and take off his clothes.
[17] He was wearing a corset with a supporter. He removed that.
Underneath that was a body stocking which covered his whole body tight knit. He removed that.
Under that was a tee shirt with eight pockets in front and four pockets in back.

Each of these pockets were sewn shut. He removed this tee shirt; placed it on a table; we opened one of the pockets; it contained a plastic bag.
I opened one of the plastic bags; it contained a white powder.
We have test kits in the search room. I took a portion of the white powder, ran what we call a field test on it, and it showed positive for cocaine.
At that time, we advised Mr. McLeroth that he was under arrest.
We read him his rights.
Q. First, Officer Percival, let me ask you to identify some items, please.
A. Yes, sir.
MR. MILLER: May I approach the witness, please, Your Honor?
THE COURT: All right.
[18] MR. MILLER: I'd like this marked as Exhibit No. 1, please.
THE CLERK: Marked as Exhibit No. 1 for Identification.

[Thereupon, the item referred to was marked for Identification as Government Exhibit No. 1.]

MR. MILLER: Can we make this one joint exhibit, Your Honor, two bags, or do you want to make it 1 and 2?
THE COURT: Perhaps we will make it 1 and 2.

[Thereupon, the item referred to was marked for Identification as Government Exhibit No. 2.]

THE COURT: Okay, Exhibits 1 and 2 for Identification.

BY MR. MILLER:

Q. Officer Percival, I show you what has been marked for Identification as Government's Exhibit No. 1 and ask if you can look at the contents contained in this plastic bag and identify the contents.
A. Yes, sir, plus we have our initials and date on each of these bags.

[19] Q. Are your initials on these bags?
A. Yes, sir.
Q. And, how many bags are in there? Can you tell?
A. There are thirteen total bags. I don't know how many is in this particular package.
Q. I'd ask you also to look at Exhibit No. 2 marked for Identification and ask if you can look at these and determine, sir, if those are the bags that you found on Mr. McLeroth on October 2nd, 1977.
A. Yes, sir.
Q. Now, how can you determine those are those bags?
A. We numbered each bag 1 through 12, plus here's my initials and the date of my initials and the officer that was working with me.
Q. Are they marked on each specific bag?
A. Yes.
Q. So, on thirteen bags you have thirteen initials?
A. Yes, sir.
This is 10 of 13 here.
Q. Okay. Did you initial these in the presence—
[20] A. In the presence of who, sir?
Q. Of Mr. McLeroth.
A. No.
Q. You did these afterwards, sir?
A. Yes, sir.
Q. Okay. And you took a sample, you say?
A. Yes.
Q. And what did that sample show?
A. It showed positive for cocaine. It's a field test that we make on the spot.
However, we later take samples from each container and send it to our lab, U.S. Customs Lab, then I think the DEA also does the same thing.
Q. And, is this procedure done pursuant to procedures of Customs?
A. This is standard procedure; yes, sir.
MR. MILLER: Your Honor, may I approach the witness?
THE COURT: Yes.

BY MR. MILLER:

Q. Officer Percival, I show you what has been previously marked as Government's Exhibit No. 2, which I will change to Exhibit No. 3, and ask if you can please identify Government's Exhibit No. 3.
[21] A. Yes. This is the—what I call a corset with supporter which we initialled and dated.
Q. Are your initials on there?
A. Yes, sir.
Q. And, can you find them on that item?
A. Yes, sir.
Q. And, did you find this on Mr. McLeroth?
A. Yes, sir.
Q. I also show you what has been marked previously as Government's Exhibit No. 2, which I will mark as No. 3, and ask you if you can identify what that item is.
A. Yes, sir. We call it a body—I forget the word I used—but this was worn under the girdle. This was taken off of him. We marked it on the collar here—it's my initials and date.
Q. On what date is that, sir?
A. 10/2/77.
Q. And, that was worn over the—
A. This was under that, sir.
Q. And, lastly, I show you a third item in Government's Exhibit No. 3, and ask if you can look at this and tell us where you found this and if you can identify this.
[22] A. Yes, sir. He was wearing this under this. This was next to his body. This is the front with eight pockets—
Q. Can you demonstrate where the pockets are for the people of the jury?
A. There's eight pockets here—or, excuse me—eight pockets in front here. Each of these were sewed by hand.
And four pockets in the rear.
Q. And, where did you find this shirt?
A. This was next to his skin; the last garment he had on.

Q. And, just to clarify—since we have gone through three documents—that was next to his skin?
A. Yes, sir.
Q. What was on top of that?
A. This.
Q. What was on top of that?
A. This.
Q. And, contained in the shirt, did you find anything, sir?
A. Yes, sir. There was plastic bags in each of these. One of them contained two plastic bags. [23] That's how you get thirteen bags out of twelve pockets.
Q. Okay.
A. And we initialled—on the bottom here.
Q. Are those your initials, sir?
A. Yes.
Q. And, are they dated, also, sir?
A. 10/2/77.
MR. MILLER: Thank you. Your Honor, at this time, I would like to offer the three items identified by the witness; the corset, the body shirt and the tee shirt, into evidence.
THE COURT: All right.
MR. McCAIN: What are those numbers on your exhibit?
MR. MILLER: 3. Government's Exhibit 3.
MR. McCAIN: Okay: All part of 3?
MR. MILLER: Yes.
MR. McCAIN: No objection.
THE COURT: All right, the three items are admitted into evidence as Government's Exhibit 3.

[Thereupon, Government's Exhibit No. 3 was received into Evidence.]

[24] BY MR. MILLER:

Q. Now, after you found these items which have been marked and admitted into Evidence as Government's Exhibit 3 and Government's Exhibit 1 and 2, the thirteen packages, what did you do?

A. As I stated before, we arrested Mr. McLeroth at that time and I read him his rights from a mimeographed form that we have.
Mr. McLeroth signed that he had been read his rights; it was witnessed by myself and the officer I was working with.
At that time, due to the size of the search room, we took him back to our office, which has our paperwork and a little more working room.
We have certain forms that we have to fill out; information on Mr. McLeroth—we have to weigh the contraband—
Q. Did you weigh the contraband?
A. Yes, sir.
Q. And what weight did you come to?
A. I believe it was 1,620—some grams, sir. I forget the last digit.

* * * * *

[GIL SHARETT—DIRECT EXAMINATION]

[31] BY MR. MILLER:

Q. Now, Agent Sharett, tell the ladies and gentlemen of the jury what you told me regarding September 26th, 1977.
A. Mr. McLeroth stated that on the 26th of September, 1977, he met Mr. Havens at Mr. Havens' law office in Ft. Wayne, Indiana, and the purpose of the meeting was for Mr. McLeroth to fly to Lima, Peru, to act as a courier to bring back cocaine to the Ft. Wayne, Indiana, area.
Mr. McLeroth stated he was advised to go ahead and leave Ft. Wayne by Mr. Havens and Mr. Havens would later join him in Lima, Peru.
That the reason for Mr. McLeroth traveling by himself was that Mr. Havens was in the process of rounding up the rest of the money to purchase the cocaine.
Mr. McLeroth departed the Ft. Wayne, Indiana area on the 26th of September and arrived at Lima, Peru, on the 27th, where, at which time he was joined on the 27th of September by Mr. Havens in Lima, Peru.

[32] Both subsequently met with a subject, Peruvian male by the name of Augusto Gonzales, where they obtained on—I believe it was on the 30th of September—obtained half of the cocaine from Mr. Gonzales and again received the remaining of the cocaine on the following day.

The cocaine was packaged in plastic packages at Mr. Augusto Gonzales' residence where, at which time, it was placed in a makeshift tee shirt which was put on Mr. McLeroth to body carry outside—back to the United States.

Q. Did he say where they stayed in Lima, Peru?

A. Stayed at the Miraflores Hotel in Lima, Peru.

MR. McCAIN: We are going to object to the form of the question.

What the prosecutor is asking is, can he state. He can state what Mr. McLeroth told him. He cannot state that—

THE COURT: Yes. All right, sustained.

BY MR. MILLER:

Q. Did Mr. McLeroth inform you as to where he stayed?

[33] A. Mr. McLeroth stated he stayed at the Miraflores Hotel in Lima, Peru.

Q. Did Mr. McLeroth inform you as to where Mr. Havens stayed?

A. Yes; at the same hotel.

Q. Now, after Mr. McLeroth told you they packaged the cocaine in a makeshift shirt, what did he then say?

A. He said that the shirt was put on him; he put the shirt on and the packages containing the cocaine were sewn in the makeshift tee shirt, and he body carried it back to Miami where he was subsequently discovered at the U.S. Customs.

Q. Did he tell you how he arrived back to Miami?

A. Yes; he flew back to Miami on Braniff Flight 974.

Q. And, on what date was that, sir?

A. What date did he arrive in Miami?

Q. Yes.

A. October 2nd, 1977.

Q. And did Mr. McLeroth tell you how Mr. Havens came back to Miami?

A. Mr. Havens came back to Miami on the [34] same flight.

Q. Was this related to you by Mr. McLeroth?

A. That's correct.

Q. Now, did you receive any items from Mr. McLeroth when you interrogated him at the airport on October 2, 1977?

A. Yes. I received an airline ticket which Mr. McLeroth used.

MR. MILLER: Your Honor, may I approach the witness, please?

THE COURT: Yes.

BY MR. MILLER:

Q. Special Agent Sharett, I show you what has been marked previously for identification as Government's Exhibit 4 and ask if you can look at that and identify it.

A. Yes. This is the ticket that I received from Mr. McLeroth; has my initials and date on the bottom right hand corner.

Q. And, what does that ticket show?

A. The airline ticket showed the itinerary of a Ft. Wayne; Atlanta; Miami; Miami; Lima, Peru; Miami; Atlanta; return Ft. Wayne.

Q. And you received that from Mr. McLeroth [35] on the 2nd?

A. That's correct.

Q. And you initialled that?

A. Yes, I initialled it.

* * * * *

[41] Q. Would you tell us what Mr. McLeroth told you, sir.

A. Mr. McLeroth stated that on or about April 26, 1977, he, along with Mr. Havens, had flown to Lima, Peru and came back to Miami, Florida, on or about the 30th of April, 1977, at which time Mr. McLeroth stated that he body carried approximately three and a half pounds of cocaine which was taped to his body by Mr.

Havens—on Mr. McLeroth's body—and was body carried back to Fort Wayne, Indiana.

Mr. McLeroth stated that on their arrival at Fort Wayne, Indiana, he was met at the Indiana airport, Fort Wayne Airport, by Mr. Havens' wife and son and both Mr. McLeroth and Mr. Havens were driven over to Mr. Havens' law office at the Metropolitan Building in Fort Wayne, Indiana, at which time Mr. McLeroth and Mr. Havens went upstairs to the office where Mr. Havens removed the packages which were taped to Mr. McLeroth's body and secured them in his office.

Q. Did you have another conversation with Mr. McLeroth regarding—

A. Yes. There was another trip which Mr. McLeroth stated that they made on the 7th of September, [42] 1977 for the purpose of bringing back cocaine into the United States to Fort Wayne, and while on that trip in Lima they were unable to obtain cocaine because the source of the cocaine allegedly could not get a hold of any cocaine for them to bring back and they came back to Fort Wayne on around the 16th of September.

Q. Now, Special Agent Sharett—

THE COURT: Now, ladies and gentlemen of the jury, you are instructed that the testimony you just heard may be considered by you in determining the intent, the intent of the defendant.

It may not be considered by you as having any bearing on whether or not the defendant was involved with another crime.

Go ahead.

MR. MILLER: Thank you, Your Honor.

BY MR. MILLER:

Q. Agent Sharett, I will ask you one last question, sir. During the time you received the cocaine, the items marked 1 and 2, did you at any time alter or change the contents of these envelopes?

A. No, I did not.

* * * * *

[48] BY MR. CULVERHOUSE:

Q. How long did you talk with Mr. McLeroth on the 2nd of October, 1977?

A. We talked—we spoke for several hours total, but the beginning of the initial conversations with Mr. McLeroth was interrupted with the proceeding we had, taking fingerprints and processing him, the onset of the investigation, we talked with him, I'd say, for approximately twenty minutes, probably.

Q. And, during the conversation, did he tell you that Mr. Havens had taken part in the conspiracy?

A. During the onset of the conversation he did not say Mr. Havens was on the flight with him, [49] but he did say that Mr. Havens was the intended recipient in the Ft. Wayne area, an indication with the conversation with him, was that the—

MR. McCAIN: Judge, we are going to object as to what an indication of conversation is.

THE COURT: Sustained. What did he say?

THE WITNESS: He stated that he was supposed to go to Ft. Wayne, Indiana, and deliver the cocaine to Mr. Havens.

BY MR. CULVERHOUSE:

Q. And, at the end of the conversation, or during the progress of it, did he tell you that Mr. Havens was on the plane with him?

A. Right. The subsequent conversation, then, he advised me that he had lied to me about the initial part of Mr. Havens not traveling with him, that Mr. Havens did, in fact, travel with him on the same flight, and that's—at which time I had Agent Martinez attempt to locate Mr. Havens in the airport area.

Q. And, did you see Mr. Havens that day at the Miami International Airport?

A. Later that afternoon, yes, sir.

* * * * *

[CHARLES MARTINEZ—DIRECT EXAMINATION]

[53] BY MR. MILLER:

Q. Now, did you determine, or did you find Mr. Havens in the airport on that day?

A. Yes, I did.

Q. And, did you approach Mr. Havens?

A. I did.

Q. What, if anything, happened when you approached him?

A. I asked him if he was Mr. Havens, after identifying myself, and the gentleman said he was Mr. Havens.

I then asked him if he would speak with me for a moment in which he stated, "Surely."

Mr. Havens and myself and a Customs Patrol Officer then proceeded to a Customs office at the airport where I had an occasion to interview Mr. Havens.

Q. Now, do you recognize Mr. Havens here in court today?

A. Yes, I do.

[54] Q. Will you please point him out.

A. It's the gentleman with the grey suit sitting at the defense table.

MR. MILLER: Let the record please indicate that the witness has identified the defendant.

THE COURT: All right.

BY MR. MILLER:

Q. Now, you stated you had a conversation with Mr. Havens?

A. Yes, I did.

Q. Now, previous to that, did you advise him of his rights?

A. Yes, I did.

Q. Tell us what happened.

A. As we entered the Customs office—I immediately advised Mr. Havens of his rights, and I began to ask him questions—Mr. Havens stated that he had traveled to Lima, Peru, with Mr. McLeroth and that he had known Mr. McLeroth from Ft. Wayne, Indiana where he was

a friend and also acted for Mr. McLeroth's behalf—on behalf of Mr. McLeroth as an attorney for him on several matters in Indiana.

Mr. Havens stated that he had traveled to Lima, Peru, with Mr. McLeroth; the purpose of the [55] trip was to generate interest in a medical supply business in Peru.

In an attempt to do this, Mr. Havens stated he had met with a gentleman by the name of Augusto Gonzales which Mr. Havens stated was an employee of an insurance company in Lima, Peru.

He stated that he—after making telephone calls, did meet with Augusto Gonzales in Lima and did subsequently go to Augusto Gonzales' apartment in Lima.

Mr. Havens stated that he did not know the nature of Mr. McLeroth's business in Lima.

He went on to say that he had made two previous trips with Mr. McLeroth, at which time I stated that it seemed unusual to me that after making three business trips to Lima with Mr. McLeroth, a long time friend and client, that he would not have discussed his business transactions or business deals.

Mr. Havens then stated that he had assumed Mr. McLeroth was in custody and he chose not to make any statements about Mr. McLeroth's business at that time.

Q. Did Mr. Havens tell you where he stayed in Lima, Peru?

[56] A. Yes, he did.

Mr. Havens provided me with the name of the hotel and stated that he stayed there with Mr. McLeroff [sic] and, in fact, that's what he stated.

Q. Did you have occasion to receive Mr. Havens' airline ticket on that date?

A. Yes, sir, I did.

MR. MILLER: Your Honor, may I approach the witness?

THE COURT: Yes, sir.

BY MR. MILLER:

Q. Agent Martinez, this is Government's Exhibit No. 7. I ask if you can look at that and identify that, please.

A. Yes, I can.

Q. And, would you please tell the jury what that is?
A. It's airline tickets which I obtained from Mr. Havens the day that I interviewed him.
Q. And, does it indicate where—it indicates air travel from Indiana to Lima and return.
MR. MILLER: I offer that in Evidence Your Honor.
MR. McCAIN: No objection.

* * * * *

[65] MR. CULVERHOUSE: The government calls John McLeroth.

Thereupon:

JOHN KENNETH McLEROTH

was called as a witness on behalf of the Government who, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CULVERHOUSE:

Q. The first thing I would like you to do is to tell me how to pronounce your name.
A. The name is pronounced McLeroth.
Q. McLeroth?
A. McLeroth.
Q. Mr. McLeroth, would you tell the jury where you live presently?
A. I live in Ft. Wayne, Indiana, at 3030 Rockwood Drive.
Q. And, how long have you lived in Ft. Wayne, Indiana?
A. Approximately fifteen years.
Q. Mr. McLeroth, would you give the jury a brief summary of your educational background?
[66] A. I'm an attorney educated at the law school at De Paul University in the city of Chicago, Illinois.
Q. When did you graduate from law school?
A. In 1956.

Q. Once you left law school in 1956, were you admitted to any bars in any state?
A. Yes, I was admitted to the Illinois Bar.
Q. And, did you practice law after being admitted to the Bar?
A. I practiced law for corporations in Chicago.
Q. Would you name the corporation and the period of time.
A. Yes, Montgomery and Ward and Company for approximately four or five years.
Q. What type of law did you practice there?
A. It was essentially contract law; drafting of contracts.
Q. And the next company you worked for?
A. Then Motorola.

* * * * *

[88] BY MR. CULVERHOUSE:

Q. Continue.
A. I then took—having been told by Augusto that it should be ready on Saturday—I was in an awful hurry to get back home—I then took my ticket and Mr. Havens' ticket over to the Braniff ticket office and changed our reservations, or at least booked firm reservations for, as I recall, for Saturday. It was like Saturday night the plane left.

It left 11:00 or 12:00 p.m. or 12:00 midnight, as I recall the outgoing flight.

On Saturday, during the day, on that Saturday, the Saturday that we left, Mr. Havens left the room—his hotel room.

I waited in his hotel room. He returned with Augusto.

Augusto was then carrying an airline bag, and from the airline bag, he, Augusto, extracted five bags which were—they were double-bagged—two bags, dark grey or dark blue in color, as I recall.

[89] And these five bags, according to Augusto, contained just under four pounds of cocaine, and also, according to Augusto, I believe I recall him saying:

"It's good stuff."

Q. Now, stop at this point and describe to the jurors how old Augusto is.

A. Augusto is in his mid-twenties. 25, or 26, or 27, I would say.

Q. And when you met him the first time, did he have any facial hair, a beard or a mustache?

A. Yes. He had a beard. Uh-huh. He had a facial—this kind of a beard.

Q. And, did Augusto tell you how he was employed, if at all?

A. I don't believe he did on that occasion.

Q. Now, continue on from the point where you stated that Augusto brought the bag containing five double-wrapped plastic bags.

A. He took these bags from his airline bag, and we then proceeded to position the bags on my body; two here, two in the lower abdomen and one in the small of the back.

And this was kind of a three man [90] operation between me and Mr. Havens and Augusto to position the bags and then tape—holding the bags in place and getting the tape around and then secure the tape—and have the tape secured binding the bags to me.

And we did this—as I recall, it was about three hours of wrapping and unwrapping and trying and failing to get the right security in the right contour and the right form to the thing.

Q. What was Mr. Havens doing at this time?

A. Well, he was helping Augusto do the wrapping around.

One would have to hold where the one Ace bandage would end, and start wrapping another one around, and then putting tape on and the final act, Mr. Havens to secure the ends of the tapes, would—so it wouldn't pull lose, the ends of the Ace bandages, I mean, would sew—were sewn around various points where the Ace bandages met, so there would be no break.

Q. Are these the Ace bandages that you took down there that you picked up from Mr. Havens' son?

A. Uh-huh.

* * * * *

[101] And I was given at that time $5500 by Mr. Havens in his driveway of his house.

Q. In what form of pay?

A. Cash.

Q. What did you do with the money?

A. Well, I put it in the—as I recall, the bank and then went on to proceed with the graduation of my daughter and I was able to write a current check against that deposit for part of the tuition owed.

There was still more owed.

But I gave them enough money that they graduated her.

So, it was a close call there.

And that's why I remember the girlfriend had returned prior—shortly before the end of May, '77.

Q. So, up to this point, the end of May, 1977, of the $15,000 that was owed to you, you had received a $25000 payment and a $5500 payment?

A. I remember distinctly the fifty-five, because it was connected with the graduation. No other money was paid during that period of time, additional monies, prior to that; that is, during the month of May, [102] and those were relatively small increments, $1,000, $1500, roughly, in terms of the $12,500 owed, but my understanding was that that was being—that was return from money—that was the money from the distribution—they said up north, or in Michigan, of some of the cocaine that they had rinsed and even some that had not been rinsed.

* * * * *

[104] BY MR. CULVERHOUSE:

Q. Mr. McLeroth, let's go back to approximately the end of May, 1977, after you had received the $5500 payment which you used for your daughter's tuition and graduation.

After that time, sir, approximately when would be the next time you saw Mr. Havens?

This would be after you received the $5500 pay.

A. Well, I saw him on other matters incident to creditor problems, and so on.

[105] Are you referring now to matters of importation of cocaine or whatever?

Q. Will you describe what matters were involved in his continuing legal and professional relation with you?

A. Well, again, we were attempting to hold off creditors, or payments thereto, until my visits in Ecuador or the Chilean Central Bank loan had been completed.

I recall that in June—I believe it was in June of 1977—Mr. Havens told me that he had taken a Lufthansa flight from New York to Lima and back again within a 24 or 36 hour period.

That trip was completed.

And, at that time, he had—he said he had returned from Lima to New York and then, instead of coming back to Ft. Wayne, had gone on to the Middle East on different business and—my recall is that at some point in June, he returned from this trip, told me that he had made the Lima trip on the Lufthansa Airline, had gone, had seen Augusto again in Lima; Augusto, he reported, was very apprehensive and was not about to provide any further cocaine source at that time.

* * * * *

[111] BY MR. CULVERHOUSE:

Q. By the end of the summer of 1977, how much money had been paid by Mr. Havens?

A. The total twelve thousand-five, or the total fifteen, if you include the $2,500 advance prior thereto—prior to the trip.

Q. Did you go to South America with Mr. Havens in September of 1977?

A. Yes. Approximately September 6th, 1977, we went to Lima, Peru together.

Q. Did you have a discussion about going prior to your leaving the United States?

A. Well—yes.

On—well—again, now, Augusto had returned to Lima, Peru from the United States having spent six weeks of his vacation with—Mr. Havens said was with this Rick

fellow—and according to Mr. Havens, they had sent him back—and the expression I think Mr. Havens used was:

"all jacked up,"

to begin supplying cocaine again.

So, Augusto was back at the end of August, and our trip was scheduled for—as I say, for September 6th, and that's when we went to Lima.

[112] I went to—my wife drove me to Mr. Havens' house, and when I—when I arrived, Mr. Havens told me that:

> "Rick and Chris are in the cabana finishing the shirt and putting the money into the shirt."

And this was a—this refers to a now instead of Ace bandage technique, this was a body shirt—not a body shirt, but a tee shirt with pockets sewn in which would hold a smaller number—a larger number of bags, but smaller bags, and was supposed to be a better contour deal.

And so, as I arrived at the Havens residence, as I said, he said:

> "Rick and Chris are in the cabana finishing sewing the money in the shirt."

It was now approximately quarter to four, or twenty till four, and we had a 4:18 flight to catch.

And I don't recall this now—either Mr. Havens went to the cabana and brought the shirt back to me, or Chris Havens came—wheeled it out and gave it to me—one way or the other, I received the shirt from one of the two of them, from the cabana.

[113] I put it on. This now had in it the buy money and also the bags, empty, which were to be used to hold the cocaine when we arrived and received cocaine in Lima. And these were the pockets of these shirts, the bags and the money.

And on the way to the airport, I asked Christ [sic] how much money was in the shirt.

And he said he didn't know.

So, on the way to the airport, Mr. Havens said to me, or said to Chris, to assure Rick that we wouldn't leave the hotel with the money until Augusto had arrived and had received the money and was on his way to obtain more cocaine.

Q. And, did you then fly to Peru?

A. Yes.

Q. Did you fly alone or with Mr. Havens?

A. No, we flew together.

Q. Do you recall—

A. At the ticket counter in Ft. Wayne, Indiana, Mr. Havens put his ticket on his credit card and he paid for mine with cash.

Q. Where did you stay when you arrived in Peru?

A. At this time we stayed at the Caesar [114] Hotel.

Caesar, it is pronounced. In Lima. And that was on the recommendation, according to Mr. Havens, of Mr.—well, of Aggusto who said it was a nicer hotel, it was away from the main part of town, it was nicer district and it was a safer hotel.

Q. When you got to the Caesar Hotel, did you meet with Augusto?

A. Augusto arrived—my recollection is—approximately 11:00 o'clock that evening—the evening following our arrival that morning.

Q. And, what conversations transpired?

A. Well—no, I'm sorry, Mr. Culverhouse.

I'm thinking now of the third trip.

On this second trip Augusto did not arrive. It was perhaps two or three days before we saw him.

And he said at that time, as he came into—we were in Mr. Havens' room—as he came into the room, he said:

> "This may be a vacation trip for you, because my source got popped."

And he meant, "arrested."

Q. What did you do from the time you got [115] to the hotel after you had flown in, until Augusto came two or three days later?

A. Well, Mr. Havens had made attempts to locate him including going to the—Augusto's family ran a cock-

fighting arena business in Lima, and he, Augusto, was often there, had often been there and so Mr. Havens went to see if he could find him.

Q. What did you do during that time?

A. I just waited at the hotel.

And I believe Mr. Havens—well, I don't know—he said he made several telephone calls but couldn't reach him.

Q. So, after Augusto—

A. Now, Augusto—I'm sorry.

Q. After Augusto came and told you that this may be a vacation trip, what then took place?

A. He said, however, that there was a possible connection he had, and he said he was trying to run this fellow down and meet with him.

He said he was an older man—Augusto said he was an older man—and he was trying to set up a connection with this fellow.

Now, we were—at this trip, we were there maybe—it was a long one—this was a ten day—we [116] were there ten days anyway, waiting for the availability of cocaine.

And at some point, after Augusto arrived and said his connection had been popped and that was all, and it would probably be a vacation, but he would see what he could do. At this point, Mr. Havens suggested that Augusto have a fellow—I know only as Jaime—the name I only know as Jaime—work with Augusto and try to develop that unavailability on that trip.

And so, August [sic] said he would talk to Jaime about that, and they were now, so far as we understood, both working on the problem of acquiring cocaine for our return.

But it was not forthcoming.

Q. Did you fly back, then, empty-handed?

A. Yes. Prior to the flight—prior to departing, Augusto said he had then just made contact with the alternate source, this older man, but he said it would take five or ten days, so there's no point in us staying any longer.

And we returned with the idea in mind that ten days down the line or so, he would have a connection set up again.

[117] Q. So, you went back to Ft. Wayne?

A. Right.

Q. Did there come a time when you went back down to Lima, Peru?

A. Yes.

Q. When was this?

A. Towards the end of the month, on or about the 26th of September.

I recall, my best recollection, it was a Monday.

And Mr. Havens had given me $750 to buy the ticket and to cover expenses for a couple of days and we left—I left that afternoon.

Mr. Havens said that he waited to receive from Rick the buy money.

And he, at one point, said that Rick came running through the airport like O. J. Simpson in the commercial, with the envelope of money, and it was a last minute thing, so I got out myself and then he got out with the money on his flight.

And, from my understanding from what he said, was that he went through Detroit, and I went through Atlanta, so we left at different times, but on the same day.

[118] Q. Thank you. When did you get to Peru?

A. The following morning.

Q. And, where did you go?

A. The Caesar Hotel. I went there—I'm alone—I'm arriving alone at the Caesar.

Q. Did you meet Mr. Havens at the hotel?

A. Yes. When I was—I was in my room a short time, the telephone rang, and he was already at the hotel.

Q. Tell the jury what happened on this third and final trip.

A. Mr. Havens told me with reference to his flight over that he was carrying the buy money in the pockets of his suit, and he became apprehensive. He looked strange going into the country with bulky pockets, and he said he made so many trips to the bathroom in the airplane that the crew became very suspicious.

He said they were—he was back and forth, and they began noticing him too much, so he asked for a couple of aspirin to explain this all the way, he was not feeling well.

And at 11:00 o'clock—11:00 that evening, I believe, Augusto arrived.

[119] Q. And, where were you staying then?

A. Again, at the Caesar Hotel.

Q. Were you and Mr. Havens sharing a room or in separate rooms?

A. No, we each have our separate room.

Q. What happened when Augusto came?

A. He took the buy money, which was my understanding, was approximately $15,000.

As best I recall, he put it in the pockets of his suit, his clothes, and left.

I recall that this was—my best recollection, it was not the boots this time, it was just put in the pocket of his clothes and left.

And this is Tuesday night.

And so, on Friday, the Friday of that week, late in the evening, reasonably late in the evening, we are now in Augusto's—he is now living in an apartment in the building, numbered 156, a short walk from the hotel, and he's living in Apartment 801, he's subleasing it.

Mr. Havens is there and I am there, and Augusto is there and the telephone rang, and Augusto returned from the telephone to say that his connection had called and had, he said, he said:

[120] "He has a button for me."

And he says:

"That means either a sample or all of it."

But he then left.

"He," Augusto, then left the apartment and—

Q. Did he have buy money at this time?

A. Oh, yes. He had had the buy money since we arrived.

Q. Who turned it over to him?

A. Mr. Havens did.

Q. And this was $15,000?

A. It was approximately—I didn't count it—I was told it was approximately 15,000. $15,600 is the figure I remember Mr. Havens saying.

Q. Continue after Augusto left to purchase this button or—

A. To pick up the button. Okay.

He returned, I'd say, in an hour, and he returned with a leather-tooled dark brown carrying case, which he said belonged to the man who was his source on this trip.

And, inside the carrying case was a [121] plastic bag, and inside the plastic bag this time a large loose bag, was a loose pile of what he said was cocaine.

And, initially, Augusto took a knife and went through the pile and was—seemed to be seeking out good from bad.

I mean, he'd find crystallized substances and would say:

"This is very, very good," and then, a flatter powder, and say:

"Not so good," and so on.

So, in any event, that particular portion, which was not the total amount, which had been agreed to be delivered for that money, the portion brought on Friday night was bagged.

Augusto would use a matchbook cover, and the small little bags that had been brought the prior trip in the shirt, were loaded, and then a sealing operation—the bags were opened only on one end and then a sealing operation went on in that—at this point now, we have arriving Augusto's brother, Sergio, and it's a Rube Goldberg type of operation in that when the bag is filled almost to the top to [122] leave enough room to seal, and Augusto's brother, Sergio, would light a large candle and then the candle would be applied by Augusto to fuse the bag together, and then I would pull the edge of that bag level with the table and Mr. Havens would apply a cardboard to seal it.

So, it was kind of a manual process of putting the cocaine into these now very small bags, which, in turn, were fitted into the pockets of the shirt.

And we worked quite late. And bagged that amount of cocaine.

And the following day, approximately, as I recall 1:00 o'clock in the afternoon, we met Augusto in front of his apartment again and this time he has the balance of the cocaine and we bring that up to the apartment and again the bagging process.

And now we have all the bags filled. And, again, it's the same kind of operation; heat is applied and August [sic] is applying heat, and I'm lining up the edges and Mr. Havens is putting a cardboard to seal the edges.

So, now, we have all of the bags.

Now, Mr. Havens observed that the odor—[123] there was an odor coming from the bags.

Q. Go ahead.

A. Mr. Havens observed that there was an odor coming from the bags. And he would bend down and sniff it, and he said that the odor seemed to be the same kind of smell that permeated his house when the first delivery was drying there; the merchandise—the cocaine that had been rinsed before—the defective stuff.

And so, Augusto withdrew from the closet a large cleaning bag and proceeded to put a second bag over the initial bags; that is, he made a double bag situation to cut down on what seemed to be an ether-like smell leaking through the single bags.

And, at this point—well, this is Saturday—and I believe we left on Saturday night—

Q. What did you wear when you left?

A. Well, in the second trip, the September 6th, I should say, trip, to Lima, and then Mr. Havens brought down a body stocking which is a ballet-type elastic and also a heavy-duty supporter.

Now—so the tee shirt with the pockets and bags, I put on and there, again, was this sewing, only this time Mr. Havens was sewing the tops of the [124] pockets up of the shirt so as to—so that the bags wouldn't bounce out, or whatever.

He was sewing those, and then I put over that the body stocking which flattened the shirt against my torso and then the heavy supporter which covered the lower part of it and then the shirt, and tie and suit, and we took off.

We went to the airport directly, as I recall—no, I just went back for our bags—in any event, it was that night—it was the same night of the day, the 1:00 o'clock meeting where Augusto brought the cocaine that we left and arrived Sunday, I believe, October 2nd, into Miami International Airport.

Q. What happened once you got into the Miami International Airport?

A. Well, unlike the first trip where Mr. Havens would remind me to stand straight or whatever, we didn't speak to each other, we just kept our distance, and I passed through the baggage check and was signed out of the regular luggage check. I mean to say, by the inspectors, and I was on my way to hand the ticket to the girl at the door and out when I was stopped by a Customs Inspector who asked me, was I wearing a back brace. [125] At this point, I said: "No, I wasn't wearing a back brace," and—

MR. McCAIN: Judge, we're going to object unless a proper predicate is laid and we're within the presence of the defendant, this conversation.

THE COURT: Overruled. Go ahead.

THE WITNESS: So, I said I wasn't wearing a back brace, as I so stated, and I went to a room, and there submitted to a search, and the body shirt was found, and the contents, as I understand, were tested on the spot in my presence and turned the solution red—I don't recall, but I was placed under arrest by Customs, and I did not then again leave and go back out to the main airport area.

I was held by Customs until the Drug Enforcement Agency personnel arrived.

BY MR. CULVERHOUSE:

Q. Did you then have a conversation with Agent Sharett of the Drug Enforcement Administration?

A. Yes, I did.

Q. When you first talked to him, did you tell him about Mr. Havens?

A. I was asked—I don't recall the conversation with Mr. Sharett precisely—I was asked by [126] Customs—by the first people at Customs, before Mr. Sharett arrived, I was asked whether anyone was traveling with me.

I answered, "No, I had"—and I have never been arrested before—I was in a room in handcuffs—I had no idea when I would be out of there—and I had a naive and trusting family in Ft. Wayne—

MR. McCAIN: Judge, we are going to object to the editorial comment. He can testify as to what he said and what happened—

THE COURT: Okay. Sustained.

THE WITNESS: So, feeling that—

BY MR. CULVERHOUSE:

Q. Excuse me.

THE COURT: Your next question.

BY MR. CULVERHOUSE:

Q When you first talked with Agent Sharett, did you tell him or the Customs agent, did you tell them that you were traveling alone?

A. Well, when I first talked with—

Q. This just requires a yes or no.

A. Yes. With the Customs agent, that's correct.

Q. When you flew from Peru on October the [127] 2nd to Miami, was Mr. Havens on the airplane with you?

A. Yes, he was.

Q. Where were you sitting? First class or tourist?

A. Tourist.

Q. Where was Mr. Havens sitting?

A. First class.

Q. Subsequently in the conversation with DEA, did you tell them about Mr. Havens and his role in this—

A. Yes, I did.

Q. —conspiracy?

A. Yes, I did.

Q. That day, were you placed in jail with Mr. Havens?
A. Yes, I was.

* * * * *

[340] Thereupon:

J. LEE HAVENS

the Defendant herein, was called as a witness on his own behalf who, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. McCAIN:

Q. Would you please state your name.
A. My name is J. Lee Havens.
Q. And, where do you live?
A. I live in Ft. Wayne, Indiana.
Q. And, would you tell the jury what your profession is?
A. I'm a lawyer.
Q. And, do you have any specialty?
A. Yes, I do. I am in general practice, but there are a couple of areas that I do specialize in. Real estate work is one; and another is corporation [341] work. Small corporations.
Q. Do you practice generally any in the area of criminal law?
A. No, I do not.
Q. Now, you are, as you understand, a co-defendant in the case at bar, right?
A. Yes, I am.
Q. Now, in Count I of the indictment, you have been charged with conspiring and combining and agreeing with McLeroth, Vigil, to commit certain crimes against the government; namely, a conspiracy to import cocaine into the United States.

And I will ask you whether or not you did, in fact, conspire, agree and combine with them to do that.
A. No, I did not.

Q. All right. Now, you have also been charged with knowingly and intentionally and in fact importing cocaine into the United States.

And, I will ask you whether or not you did that.
A. No, I did not do that.
Q. You have also been charged with knowingly and intentionally possessing with intent to [342] distribute cocaine into the United States.

I will ask you whether or not you are guilty of that.
A. I am not guilty of that.
Q. Now, I want to ask you first of all whether or not you know Augusto Gonzales Vigil.
A. Yes, I do.
Q. And, I'll ask you whether or not in the year 1977 you had occasion to see him.
A. Yes, I did. I saw him on several occasions.
Q. How can you recall—and tell the jury—when would have been the first time in 1977 that you saw Augusto?
A. In 1977, the first time I saw him was in Lima, Peru.

* * * * *

[348] Q. All right. During that conversation, then, were any arrangements additionally made with regard to—specifically to the trip to Lima, Peru?
A. I think not.
Q. Did you have any conversations with Mr. McLeroth before leaving the United States for Peru?
A. Oh, I'm sure we did. You know, we are planning a trip of some magnitude. I've always enjoyed traveling and—at least until recently—so, I'm sure that we did talk about what to wear, what to take, that sort of thing, but I can't remember any specific conversation about it.
Q. During the course of all of these conversations, while in the United States and before leaving for Lima, Peru, did you ever discuss with him the purchase and import of cocaine?
A. No, sir, I did not.
Q. All right. And, did he ever advise you that he was going to engage in smuggling cocaine into the United States?
[349] A. No, he did not.

Q. All right. Now, when you went to Peru on this first visit, will you state to the jury, if you can recall, where you left from and the airline and how you got down to Peru.

A. Well, I'm not sure I remember the airline. We had originally planned to fly down together.

Rather at the last moment, like a few days before, John said that he had some other business—and I think it was Chicago that he had to go to—but I'm not sure about that—and that he'd be down later.

And so sometime in the latter part of April, I flew to Miami. I—we don't have too big a choice of airlines to fly in—out of the Ft. Wayne—it's sort of off the beaten path—I can't recall whether I took Delta or United—it had to have been one of those, because those are the only two ways that you can fly—I believe I took a Braniff flight out of Miami.

Q. To Lima?

A. Yes. I know it left late at night and got in around breakfast time.

Q. Did Mr. McLeroth accompany you on that [350] flight?

A. No, he did not.

Q. So, you went alone?

A. Yes.

Q. And you have already related, of course, the business that you conducted with Augusto while there on that first visit.

And I will ask you now whether or not you saw Mr. McLeroth in Lima, Peru on that first visit.

A. Yes, I did. I saw him quite a bit, as a matter of fact.

Q. Would you state to the jury where you saw him and under what circumstances you saw him.

A. Well, first of all, he had told me, when he planned to come in, to Lima, and I was staying at the Hotel Crillon, and—I don't recall how I decided to stay there—it wasn't a particularly nice hotel—I think I had gotten the name out of a travel guide or something. It—I didn't know where it was or anything.

I—fortunately, I got a taxi driver who could understand what I said, which I was surprised at, and so, I went to the Hotel Crillon and I got a—I reserved a room for John when I got there because he [351] said he was coming in, I think, in two or three days, whatever he told me.

I said, "There's going to be a man arriving at that time, and he's going to be taking a room, a single room."

Q. All right. Now, did you return on the same flight?

A. Yes. I'm sure that—I'm sure that I did.

Q. And, I'll ask you now, whether or not on that occasion, you imported any cocaine back into the United States?

A. No, sir, I did not.

Q. And do you know whether or not Mr. McLeroth did?

A. No, I do not. I consider it unlikely, but I don't know.

Q. All right. Now, you've testified earlier there were some other occasions that you went to Lima, Peru, and I will ask you now about the second time that you went down there, and if you can tell the jury about when that second trip would have been, to Lima, Peru.

A. Yes, I can tell you approximately. [352] It was the first part of June. In '77.

Q. And, did you have any conversation with Mr. McLeroth concerning the second trip?

A. No, I did not. I—well, I didn't prior to the trip. That I recall.

Q. Did he accompany you on that trip?

A. No, he did not.

Q. Will you tell the jury whether or not you ever met him while you were in Lima, Peru, on that second trip.

A. No, I did not. To my knowledge he wasn't there.

* * * * *

[375] Q. All right. Now, before you returned to the United States, did you engage in purchasing cocaine

with money which you had or Mr. McLeroth in paying money to Augusto for cocaine?

A. No. No, I didn't do nothing of that sort.

Q. And you heard Mr. McLeroth testify earlier as to something to the effect that this material was taped or draped around his body and so on, you heard that testimony?

A. Yes, I did.

Q. Did you ever engage in that kind of activity with Mr. McLeroth and Augusto or Mr. McLeroth and anyone else on that fourth visit to Lima, Peru?

A. I did not.

Q. Now, this is the fourth visit to Peru, on the return, was the time that Mr. McLeroth was stopped and arrested for the possession and so forth, of cocaine.

[376] I will ask you first whether or not you knew that he, McLeroth, was bringing cocaine back into the United States from Lima, Peru.

A. No. I did not.

Q. Now, when you returned from Lima, Peru, into the United States, did you come into the Miami International Airport?

A. Yes, I did.

Q. And I will ask you whether or not you proceeded through Customs. You.

A. Yes, I did.

Q. I will ask you whether or not you were arrested with cocaine on your body or luggage or anywhere else.

A No, I was not.

Q. Subsequent or following the arrest of Mr. McLeroth, as previously testified by the Customs agents, on that same day, later in the day, were you arrested?

A. Yes, I was.

Q. And the charges made against you which are now pending in this court.

A. That's correct.

* * * * *

[383] BY MR. CULVERHOUSE:

Q. Take your time and examine that, sir.

A. All right.

Q. What size is that shirt?

A. A 38-40.

Q. What size do you wear, sir?

A. A 46. 44, sometimes, 46, sometimes.

Q. This would not be your shirt?

A. No, it would not.

Q. Now, on direct examination, sir, you testified that on the fourth trip you had absolutely nothing to do with the wrapping of any bandages or tee shirts or anything involving Mr. McLeroth; is that correct?

A. I don't—I said I had nothing to do with any wrapping or bandages or anything, yes. I had nothing to do with anything with McLeroth in connection with this cocaine matter.

Q. Now, before today, have you ever seen this tee shirt?

A. Yes, I have.

Q. When was that?

A. Well, I saw a photograph of it.

Q. But, you have never seen that in person. [384] Never seen it on Mr. McLeroth.

A. No. It might have been shown to me at the airport when I was arrested, but I don't think so.

I think that—I think that—the only time I have seen this or what appears to be this, would have been a photograph. I think there was a polaroid photograph taken; showed Mr. McLeroth standing rather erect and a shirt appearing like this on him and it had packages sticking out of the pockets.

Q. And your testimony is that you had nothing to do with the sewing of the cotton swatches to make pockets on that tee shirt?

A. Absolutely not.

Q. Sir, when you came through Customs, the Miami International Airport, on October 2, 1977, did you have in your suitcase Size 38-40 medium tee shirts?

MR. McCAIN: May we approach the Bench?

THE COURT: All right. Ladies and gentlemen, you can step into the jury room, if you will, please, while we take this matter up.

Thank you.

[Jury excused.]

[385] THE COURT: Mr. Havens, you may step down, if you don't mind, and step outside for just a minute while we go over this.

THE WITNESS: Yes.

THE COURT: We will have these outside the presence of the witness.

MR. McCAIN: All right.

[Thereupon, the witness was temporarily excused from the witness stand.]

THE COURT: All right, Mr. McCain.

MR. McCAIN: This was the subject matter of a motion to suppress, which was granted as to the contents of a suitcase and which I believe I made inquiry of just now to which question I objected.

On direct examination, I asked Mr. Havens specifically if he had any contraband, and cocaine found on him, or his person, or anywhere else, which does not open the door to tee shirts or anything of that kind.

MR. CULVERHOUSE: He asked if he had any wrappings around him or tee shirts on the motion, and that the whole denial—

MR. McCAIN: Around him.

[386] MR. CULVERHOUSE: Around him. Or have anything to do with it. And he has denied it from the stand.

Oregon vs. Haas, a Supreme Court case, the case of Harris vs. New York, in a case in which I participated as the prosecutor, United States of America vs. Leiberman, all support the proposition that this is a proper question for impeachment.

If he denies it, I will be permitted to bring in rebuttal testimony.

THE COURT: May I ask what item was suppressed at the suppression hearing before the Magistrate?

MR. CULVERHOUSE: Two tee shirts, size 38-40, medium, carried in the suitcase of Mr. Havens and in addition, three hotel receipts, two in the name of Mr. Havens and one in the name of Mr. McLeroth, with a Diners Club receipt of Mr. Havens paying for Mr. McLeroth's bill.

MR. McCAIN: That's correct.

THE COURT: Now—

MR. CULVERHOUSE: And one of the tee shirts—excuse me—there's swatches of cloth cut out which are similar to the swatches sewn on this tee [387] shirt.

THE COURT: Well, let me see that tee shirt.

While he is getting that, what is the significance of the bill that was paid by Mr. Havens, who, the receipts for which were found in Havens' suitcase?

MR. CULVERHOUSE: The only significance I can see, of course, I have not brought it out—

THE COURT: You just talked about it.

MR. CULVERHOUSE: Yes. I don't intend to get into that. The only thing it shows the connection between Mr. Havens and Mr. McLeroth, that Mr. Havens paid for three days at the hotel of Mr. McLeroth.

Mr. Havens testified to that. Mr. McLeroth testified to that. I don't intend to introduce those. I don't intend to introduce this tee shirt, if there's an affirmance that it's there.

Do you want to open that up to show the swatches?

MR. McCAIN: Let me ask if I ask you this question—

MR. MILLER: Your Honor, if you take it out, you can see it's been cut in the rear.

[388] THE COURT: Let me get the Clerk in here.

MR. CULVERHOUSE: Is Agent Martinez out there?

Bring him in. He can tell us which tee shirt has the holes cut out of it.

THE COURT: Thank you. (Examining article.)

MR. MILLER: We have it opened.

THE COURT: Is this the one with the swatches cut out that you are talking about?

MR. MILLER: Yes.

MR. McCAIN: We have already got it.

MR. CULVERHOUSE: All right.

THE COURT: Agent Martinez, is this the shirt that was found in Mr. Havens' luggage? It's been marked Exhibit D in your markings. It was just handed to me by counsel.

Is that what you're referring to with the swatches cut out?

Is that what you're talking about?

AGENT MARTINEZ: Yes, sir, I believe there should be a sticker on it.

THE COURT: Yes, there are stickers [389] on it. But this is what you are referring to that you want to ask him about?

MR. CULVERHOUSE: Yes, sir.

THE COURT: It is your contention that these swatches were sewn in the other—

MR. CULVERHOUSE: Yes, sir, it is the contention that it is Mr. McLeroth's tee shirt, and—

THE COURT: You mean Mr. Havens' tee shirt.

MR. CULVERHOUSE: Mr. McLeroth's tee shirt in Mr. Havens' bag.

THE COURT: Okay. And you want to ask him about that.

MR. CULVERHOUSE: Yes, sir.

THE COURT: Your objection is—

MR. McCAIN: Our objection is, Judge, this was the subject on the motion to suppress which we had a hearing on in which there was a ruling, and which it was suppressed and there's a written order on that on which we have relied coming into this trial.

THE COURT: Well, of course, it is the law that—

MR. McCAIN: We would make the same argument that we made at that time in which the argument [390] is included in the order.

THE COURT: Well, I have reviewed the Magistrate's order which suppressed the evidence of the items that were seized from the suitcases.

MR. McCAIN: Yes, sir.

THE COURT: It did not suppress the items or other matters that were seized from him personally.

MR. McCAIN: That's correct. We are not concerned about that.

THE COURT: But a motion to suppress, the granting of a motion to suppress does not mean that the evidence cannot be used for any purpose. There is one limited area in which it can be used; and that is to impeach a witness who takes a contrary position.

MR. McCAIN: I understand.

THE COURT: If he does later in the trial.

Now, here, the suggestion is that Mr. Havens, in denying that he had anything to do with the—

MR. McCAIN: Importation.

THE COURT: —importation and [391] specifically in denying that he had anything to do with the wrapping of Mr. McLeroth's body with the Ace bandages or with the dressing of Mr. McLeroth with the tee shirt with the pockets in it that held the cocaine; that, in denying that, that counsel is now entitled to offer into—and in saying that he only wears Size 44-46, or sometimes 44 tee shirts, the government wants to offer this other tee shirt in evidence which appear to be linked or may be linked to the tee shirt that contained the contraband with the patches sewn on it that was found in Mr. Havens' suitcase.

MR. CULVERHOUSE: I would only be allowed to do that if he denied bringing it in and it is his. As I understand it.

Otherwise—

THE COURT: He has denied having anything to do with the cocaine.

He has denied having anything to do with Mr. McLeroth's wrappings or dressing or anything to do with the conspiracy where McLeroth brought the cocaine into the United States.

MR. McCAIN: But, to rule that that would be admissible merely because of that general [392] denial, Your Honor, amounts to a curious victory on the motion to suppress, because by putting him on the witness stand, I don't have him deny the charge, then the jury—then he can get up in final argument, or the jury could assume then that he did do these things because he didn't deny them.

THE COURT: No, the government can't argue that the man failed to take the witness stand. In fact, the jury will be instructed—

MR. McCAIN: He took the witness stand, you see, but—

THE COURT: I know.

MR. McCAIN: We specifically said that we did not import cocaine. Therefore, we are being put in an impossible position of taking the witness stand and then not saying anything about the allegation.

THE COURT: Well, I understand—

MR. McCAIN: You have got us caught between a rock and a hard place.

THE COURT: Well, I haven't, the Supreme Court of the United States has.

MR. McCAIN: I didn't mean a personal attack on the Court.

THE COURT: No, I understand.

[393] MR. McCAIN: So, we are in between a rock and a hard place, if I put him on the stand, Your Honor, and I don't ask him anything about whether or not he participated in the importation of cocaine, whether or not he participated in a conspiracy in Lima, Peru, to bring this back in here, then the jury is going to sit there and think:

"That guy didn't even deny these charges."

Then, on the other hand, if I do deny, then the government comes in, as they have done now, and they say:

"Well, now, we are entitled to put this tee shirt in,"

and that, and all these items that were in the luggage that were suppressed.

And, I'm trying to figure out, I've got to deny these things, otherwise we might not as well have a trial. We might as well just plead guilty.

MR. CULVERHOUSE: The Supreme Court said in New York vs. Harris:

> "The shield provided by Miranda cannot be perverted into a license to [394] use perjury by way of defense free from risk and confrontation with prior inconsistent utterances."

And this is an identical situation.

MR. McCAIN: It hasn't anything to do with perjury.

THE COURT: Well, that's what he's getting at. I mean—well, they used the strong language. They use it in—Justice Blackmun uses it in Oregon vs. Haas.

MR. McCAIN: I know that.

THE COURT: Also, he says, and I quote from Page 1220 of the opinion, which is at 420 US 1215, Justice Blackmun speaking, quote:

> "The prosecution had not sought to use the statement in this case in chief for it conceded that they were inadmissible under Miranda because Harris had not been advised of his right to appointed counsel."

Same situation, statements having been suppressed at the suppression hearing.

MR. McCAIN: Yes, sir.

THE COURT: Going on with the quote:

> "Chief Justice, speaking for the court, [395] observed at 401 US at 224, 91 S.Ct at 645:
>
> " 'It does not follow from Miranda that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided, of course, that the trustworthiness of the evidence satisfies legal standards.' "

It goes on and continues the quote later on, it says:

> "That the 'shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.' "

The opinion discusses this at some length, and it appears that the risk being that one runs in taking the stand and testifying and denying involvement is that the

government may then, if they have evidence, that is consistent with his present testimony on the stand, even though it is barred under a motion to suppress, it may be used against him.

My concern here is whether or not the government has such evidence.

MR. McCAIN: That's correct.

[396] THE COURT: Now, that's my concern.

If they have such evidence that is inconsistent with something he has said on his direct examination or, indeed, on cross examination, then they may use it.

Now, they have suggested that they have this tee shirt which is—let me mark this for Identification, the next numbered, so we know what we are talking about.

What would it be? No. 3 for Identification?

The government has in the white plastic bag, Government Exhibit 3 for Identification, which is a tee shirt, which was found in Mr. Havens' suitcase at the airport, but not as a result of an illegal and unlawful search, as found by the Magistrate and affirmed by the Court.

They did not use this tee shirt in evidence—I am referring to it as 3—so, don't worry about—

MR. CULVERHOUSE: Government Exhibit 9.

THE COURT: Well, what happened to 3, Pat?

MR. CULVERHOUSE: That was looking at [397] the defense exhibit.

THE COURT: Well, let me start all over again so the record will be clear here.

Is 9 the right number now, Pat?

MR. CULVERHOUSE: Yes.

THE COURT: All right.

[Thereupon, the item referred to was marked for Identification as Government Exhibit No. 9.]

THE COURT: The government has, as Exhibit 9 for Identification, a tee shirt that was found in Mr. Havens' suitcase after it was searched at the airport by agents of the DEA some four hours after Mr. Havens had cleared Customs.

This has been determined to be the result or the fruit of an illegal search—was held by the Magistrate not to

be a border search and therefore they required a warrant to search the luggage—all right.

So, the tee shirt, marked Exhibit 9 for Identification, was not utilized by the government in their case in chief, because they could not use it for any purpose.

It had been suppressed.

[398] Now, the question is, whether or not the tee shirt and questions about the tee shirt would be proper as being inconsistent with something the defendant has said on the stand.

Now, he has not been asked on the stand whether or not he was carrying a tee shirt which had been cut up, or portions cut out of it, which could have been used in the other tee shirt.

He has not been asked that, but I presume you intend to ask that question.

MR. CULVERHOUSE: That was the question I was getting into.

THE COURT: And if he denied that, then you would intend to offer this, not for the proof of his guilt, but for proof of his—

MR. McCAIN: What?

MR. CULVERHOUSE: It would be for impeachment purposes through Agent Martinez.

MR. McCAIN: How can he be impeached, Your Honor, if it was not covered on direct, whether or not he had—

THE COURT: It does not have to be covered on direct. If he denies something under oath, which is—

[399] MR. McCAIN: Well, he wouldn't—if he were asked the question, Judge,

"Was there a tee shirt found, Size 38-40 in your suitcase?"

he is not going to lie under oath. He is going to say:

"Yes, there was."

THE COURT: Fine. Then, that takes care of it.

MR. McCAIN: He is not going to lie under oath. I can guarantee that. Not with me representing him, he won't.

THE COURT: Well, we will soon find out, because I guess he will be asked.

MR. McCAIN: I will guarantee that he will say, he will, if he is asked that question, and he is under oath, and he is required to answer that question because of a ruling by the Court, then he will answer:

> "Yes, there was a Size 38-40 tee shirt found in the luggage,"

in his luggage.

THE COURT: Portions of which had been cut out. Patches or portions, the tail of it had been [400] cut up and out.

MR. McCAIN: Then, as I understand it, from your ruling, then at that point they can put the tee shirt in evidence against us.

THE COURT: Not if he answers truthfully.

MR. CULVERHOUSE: If he says, "Yes"—that's what I was getting at earlier—if he says:

> "Yes, the tee shirt was found,"

my next question, I would proffer, would be:

> "Did you tell Agent Martinez on the 3rd of October that that tee shirt belonged to Mr. McLeroth?"

If he says, "Yes"—

MR. McCAIN: He will say, "Yes."

MR. CULVERHOUSE: I cannot go any further.

THE COURT: Yes. That's all we are talking about.

And the instruction that I give to the jury after the testimony is that—right from the opinion in Oregon vs. Haas, it says—the trial judge there, the court approved the instructions—instructed, quote:

[401] "The statement made by Haas [sic] to the officer may not be used by you as proof of the defendant's guilt, but you may consider that testimony as it bears on the credibility of the defendant as a witness when he testified on the witness stand."

So that's the instruction they get. They cannot consider it as part of guilt, but only as to credibility.

MR. McCAIN: So, I understand the law, that the government may now ask him whether or not there was a tee shirt, Size 38-40, found in Mr. Havens' luggage, which was partially cut out, and he says, "yes," then that's as far as the questioning or anything can go.

THE COURT: They can ask him if he made the statement to Agent Martinez that it belonged to Mr. McLeroth.

MR. McCAIN: Yes. If he says, "yes," to that, then that's the end of it.

THE COURT: That's the end of it. If he denies it, then it's—

MR. McCAIN: May I now have an opportunity to advise my client?

[402] THE COURT: No, sir. You may not. You may not at all. The whole purpose of this is not for you to go out and coach your client as to what to say.

MR. McCAIN: I am not going to tell him what to say.

THE COURT: Well, that's what you just asked me permission to do. That's why I asked him to step out, so he would not hear this discussion.

The whole purpose is searching for the truth. I assume he is going to tell the truth when he comes back in. If he does that, that's the end of it.

If he does not, why—all right, bring the jury in.

Get the jury and then we will ask the witness to come in.

Give him the tee shirt back. It is marked for Identification. You may leave that in here. Keep it right in here in your briefcase.

MR. McCAIN: May I get my client?

THE COURT: Would you wait just a minute? The Marshal will get him in just a second.

Pat, would you go out and ask Mr. Havens to step in, please, and take a seat in the witness box.

[403] There will be no conversation with the witness.

Bring the jury.

[Jury present.]

THE COURT: All right, be seated. We excused the witness while we had this out of court discussion on the law.

He is coming right now.

[Thereupon, at 11:37 all parties were present, and the defendant resumed the witness stand.]

THE COURT: Just have a seat. All right, Mr. Culverhouse.

MR. CULVERHOUSE: Thank you, Your Honor.

CROSS EXAMINATION [Continued]

BY MR. CULVERHOUSE:

Q. Mr. Havens, calling your attention to the testimony earlier when I was on cross examination, you said that you wear a Size 44-46 tee shirt. Is that correct?

A. Yes. That would fit me.

Q. But you don't wear a Size 38 to 40 tee shirt?

[404] A. No. Not for many years.

Q. On October 2, you flew from Peru into the Miami International Airport, is that correct?

A. Yes, I did.

Q. And you took your baggage and cleared Customs; is that correct?

A. Yes.

Q. On that day, sir, did you have in your luggage a Size 38-40 medium man's tee shirt with swatches of clothing missing from the tail of that tee shirt?

A. Not to my knowledge.

MR. CULVERHOUSE: Can I have an Identification tag put on this?

THE COURT: Consider it as Government's 9 for Identification. And show it to the witness.

BY MR. CULVERHOUSE:

Q. Mr. Havens, I'm going to hand you what is Government's Exhibit 9 for Identification and ask you if this tee shirt was in your luggage on October 2nd, 1975.

A. Not to my knowledge. No.

Q. Sir, on October 3, 1977, you were leaving Miami, Florida, to return to Ft. Wayne, Indiana. [405] Is that correct?

A. That's correct.

Q. And, at that time, did you pick up your luggage from Agent Martinez of the Drug Enforcement Administration?

A. Yes, I did.

Q. And, at that time, did you tell Agent Martinez that that tee shirt that was found in your luggage did not belong to you, but belonged to John McLeroth?

A. No, I did not say those words. No.

Q. What words did you say?

A. I said that—they showed me a tee shirt when I went up to pick up my luggage, and this may well have been the tee shirt that they showed me, I don't know, they said:

"What size shirt do you wear?"

And I said, "I wear," I think I said, "a 46, usually."

But I don't wear—I don't wear this type of shirt. My shirts—my undershirts are the single straps over the—and—so, I said;

"I"—they asked me, I believe, if Mr. McLeroth wore this size shirt.

[406] And I said, "He probably does. He is somewhat smaller than I."

But I said, "I definitely don't wear this size shirt."

They held this one up and they held another one, I think, or one that looked like this, and another one, and to my knowledge, that was the first time that I had seen those shirts, and I don't know whose they were or whose they are. I know they're not mine. I know I didn't put them in my suitcase.

And, I know I didn't see them in my suitcase.

I only saw these—well, I'll take it back.

The agent the next—the day I took my luggage, the agent brought in my suitcase.

And he said, "Let me give you a receipt for this."

"For your suitcase back."

And I says, "I don't need a receipt. I just want to get out of here." I had spent the night in jail.

And he said, "No, no, let's look through it."

[407] So, he reached in the suitcase and pulled this out.

And this was the first time that I had seen the shirt.

He said, "Is this yours? "

And we went through that conversation that I just related.

MR. CULVERHOUSE: May I approach the witness, Your Honor?

THE COURT: Yes.

BY MR. CULVERHOUSE:

Q. Mr. Havens, I am going to hand you what has been marked as Government's Exhibit 10. It's in a bag. If you wish to remove it, fine.

Otherwise, it's a Size 38-40 medium tee shirt by the same manufacturer as Exhibit No. 10.

Have you ever seen this one, sir? Calling your attention to October 2, 1977.

MR. McCAIN: May we approach the Bench?

THE COURT: All right. Well, just a moment.

[Bench conference.]

MR. McCAIN: Now, he has testified that that tee shirt that agent pulled out of his suitcase [408] and showed him, as I understand it, that is similar.

THE COURT: They can go ahead on impeachment, because he denied any connection with it.

MR. McCAIN: What he said was that the agent pulled it out of the suitcase on that day.

THE COURT: Yes, I heard him.

MR. McCAIN: So I understand, he said this was in the suitcase that the agent pulled it out.

THE COURT: That was not the thrust of his trying to tell this jury. I guess the thrust is that the agent put it in there.

MR. McCAIN: Could I voir dire and ask him the thrust of his testimony? I know it is not. I know that's not what he's trying to tell the jury. I will let counsel ask him that.

THE COURT: He wants you to ask him whether or not he is suggesting that the agent put it in there.

[In open court.]

BY MR. CULVERHOUSE:

Q. Sir, looking at Exhibit No. 10 for Identification—would you like that tee shirt taken out of that bag?

A. No. I think they all look alike. [409] Except for the size and the label.

Q. And that tee shirt is Size 38-40 in that bag?

A. Yes. Medium, 38-40.

Q. And it's like Exhibit No.—

A. I couldn't say. Yes, the label appears to be identical.

Q. Sir, is it your testimony that on October 2, 1977, when you came through Customs that this was not in your suitcase?

A. No. I never saw these items in my suitcase until an agent pulled them out of the bag on October 3rd; the day afterwards when I went to pick them up.

I'm not saying they weren't in my suitcase. I don't know that. I know that if they are in my suitcase I had no knowledge of them being there.

Q. Did you pack your suitcase?

A. Yes, I did.

Q. In Peru.

A. Yes.

Q. Sir, are you suggesting that the agents of the Drug Enforcement Administration placed this in your suitcase?

[410] A. I am not suggesting anything. I am just testifying to what I know.

MR. CULVERHOUSE: Thank you.

Your Honor, at this time, I would have no more questions of Mr. Havens. But, I would like to call a rebuttal witness.

THE COURT: Let's wait until the defense rests. Do you have any redirect examination?

MR. McCAIN: No, Your Honor. He may step down. But, we have not rested.

THE COURT: I just said that. I just said:

"We will have to wait until the defense rests."

MR. McCAIN: I have, I think, two short witnesses that I would like to get on now, Judge.

THE COURT: All right, fine.

MR. McCAIN: Sit down, Mr. Havens.

[Witness excused.]

* * * * *

[CHARLES O. MARTINEZ]

[438] DIRECT EXAMINATION

BY MR. CULVERHOUSE:

Q. Mr. Martinez, just to go back over one point. Were you on duty on October 2, 1977?

A. Yes, I was.

Q. Were you at the Miami International Airport on that date?

A. I was.

Q. And, on that day, did you see the defendant, J. Lee Havens?

A. I did.

Q. Approximately what time of the day did you see him?

A. Approximately 4:00 p.m. in the afternoon.

Q. And, did you have a discussion with Mr. Havens in the offices of Customs or DEA?

A. I did.

Q. And, was his suitcase there?

A. Yes.

Q. Sir, did you examine the contents of this suitcase?

A. Yes.

Q. In the presence of Mr. Havens?

[439] A. I did.

Q. Mr. Martinez, I am going to hand you what's previously been marked as Government's Exhibit No. 9.

MR. CULVERHOUSE: Your Honor, may I approach the witness.

BY MR. CULVERHOUSE:

Q. I would like you to take this out of the bag and tell me if you can identify it.

A. Yes, I can.

Q. What size is that?

A. This is a Fruit of the Loom tee shirt, Size 38-40.

Q. How can you identify it?

A. I placed a sticker, which we use to identify pieces of evidence, which bears my name on it.

Q. Where did that come from?

A. This came from Mr. Havens' suitcase on that date.

Q. And, this was taken out of the suitcase in his presence?

A. Yes.

MR. CULVERHOUSE: May I approach the [440] witness?

BY MR. CULVERHOUSE:

Q. I am going to show you what's previously been marked for Identification as Government's Exhibit No. 10.

I am going to ask you the same question.

Can you identify it?

A. Yes, I can.

Q. What is it?

A. That's the second tee shirt which was removed from the same suitcase; Mr. Havens' suitcase.

Q. What size is it?

A. It's a 38-40.

Q. Was this removed in the presence of Mr. Havens?

A. Yes.

Q. From his suitcase?

A. Yes.

Q. On October 2?

A. Yes.

Q. And you saw it removed?

A. Yes, I did.

Q. Did you ask Mr. Havens about this?
A. I did.
[441] Q. And, what did he say?
A. He said that these were not his tee shirts; that they belonged to Mr. McLeroth.
MR. CULVERHOUSE: Thank you. I have no further questions.

CROSS EXAMINATION

BY MR. McCAIN:

Q. You didn't find anything like any cocaine or anything in that suitcase at all; did you?
A. I did not find any cocaine in the suitcase.
Q. Or in his person?
A. That's correct.
MR. McCAIN: Thank you. That's all.
MR. CULVERHOUSE: Your Honor, at this time, the government would introduce into evidence Exhibits 9 and 10.
MR. McCAIN: Judge, we have the same objection as we made earlier.
THE COURT: Overruled. Admitted into Evidence, as Exhibits 9 and 10.

[Thereupon, Government's Exhibits Nos. 9 and 10, respectively, were received into Evidence.]

[442] THE COURT: All right, ladies and gentlemen, at this time, counsel for the respective parties can talk to you in their closing argument during which they will argue their respective views of the case as they see it and understand it.
This argument is not evidence as you have been hearing from the witness stand. It is just intended to be helpful to you in arriving at your decision.
All right. Mr. Culverhouse.

[RELEVANT PORTIONS OF SUPPLEMENTAL TRIAL TRANSCRIPT]

[12] [CLOSING ARGUMENT OF MR. CULVERHOUSE]

* * * * *

The four trips of Mr. Havens to South America and one trip of Mr. Vigil to North America, exact zero sales, were completed. There's no incorporation papers. There's no sales. There is no nothing except expenses of flights to South America and expenses of flights to North America.
Finally, ladies and gentlemen, let's consider the testimony of Mr. Havens.
Mr. Havens tells you that when he came into America, the airport, on October the 2nd, and when he was arrested, he said he didn't know what Mr. McLeroth was doing down there.
According to the conversation, Mr. Martinez related to you. He didn't know what his friend was doing, but his friend traveled with him three or four times down there.
Ladies and gentlemen, he also asks you to believe him when he was on the stand and when he was on the stand he was asked a pertinent question that we have just gone through. All of you were here.
He was asked if, when he came through at Customs, he carried two tee shirts, size 38, size 40.
Now, the government's going to ask you [13] when you take back all of the evidence to take the two tee shirts, size 38, size 40, and compare them with Government's Exhibit 3.
One tee shirt, size 38. The government is more interested in the credibility of the question when Mr. Havens was asked:

"Did you bring back two tee shirts, size 38, size 40?"
"Did you bring it in on October 2nd?"
"Was it in your suitcase?"

And he said, "No."
You heard it.

Mr. Martinez testified not more than five minutes ago that when he looked in the bags, when he took the clothes out of Mr. Havens' suitcase, there were two tee shirts, Exhibit 9 and Exhibit 10, size 38, size 40.

When the issue gets down to the credibility of the two parties, Mr. McLeroth, who has confessed his part in the crime, who has confessed and said:

"I'm guilty,"

and you have Mr. Havens, who stood in front of you and lied to you.

* * * * *

SUPREME COURT OF THE UNITED STATES

No. 79-305

UNITED STATES, PETITIONER

v.

J. LEE HAVENS

ORDER ALLOWING CERTIORARI. Filed November 26, 1979

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 308008 177

Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-305

UNITED STATES OF AMERICA,

Petitioner,

vs.

J. LEE HAVENS

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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IN THE

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No. 79-305

UNITED STATES OF AMERICA,

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J. LEE HAVENS

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

I.

STATEMENT.

Pages 2 and 3 of the government's petition filed in this court summarize the arrest of respondent Havens and government witness McLeroth, as well as the result of Havens' trial and sentencing.[1] The Court of Appeals for the Fifth Circuit reversed Havens' conviction and ordered a new trial because of the improper admission in evidence of items which had been suppressed as evidence prior to trial, the items in question having been illegally seized by government agents in violation of Havens'

1. McLeroth, who was charged with the same offenses as respondent Havens, had two counts against him dismissed on motion of the government, and he received a sentence of five years probation for importation of cocaine.

rights under the Fourth Amendment to the United States Constitution.[2] The statement by the government concerning the suppressed evidence, however, requires amplification.

Government witness McLeroth, who had made numerous trips to South America over a period of several years (Tr. 68)[3], made three trips to Peru in the company of Havens during 1977: once in April and twice in September (Tr. 82-117).

McLeroth testified that on the April trip[4], with Havens' help, he had smuggled a substantial quantity of cocaine into the United States. He said that the cocaine was placed about his body and that Havens helped wrap his body with ace bandages and tape to hold the cocaine securely in place (Tr. 89-90).

McLeroth then testified that an improved technique was developed whereby a pocketed shirt was used and the wrapping of his body with tape and bandages was abandoned (Tr. 112).

He testified that prior to their first trip in September, Havens had given him a T-shirt with pockets sewn on it for the purpose of smuggling cocaine (Tr. 111-112) and that he wore the shirt to Peru on that first trip early in September. He said that no cocaine was available, necessitating a second trip, later in the month (Tr. 116-117). At the conclusion of this late September trip McLeroth was arrested wearing the pocketed shirt filled with thirteen packages of cocaine (Tr. 14-25). Havens

2. On appeal Havens also raised two issues which were not ruled upon by the Court of Appeals in the apparent belief that its decision made moot the questions raised. One issue was prosecutorial misconduct during trial, and the other issue was the denial of right to counsel in violation of Haven's rights under the Sixth Amendment to the United States Constitution (see footnote 4 of the court's opinion, Appendix A, page 2a of the government's petition).

3. "Tr." refers to the transcript of the proceedings at trial. "Supp. Tr." refers to Supplement to Trial Proceedings, Closing Argument of Counsel.

4. This trip in April, 1977 was Havens' first trip to South America (Tr. 346).

was arrested a few hours later, while awaiting departure by domestic air carrier to his home in Indiana.[5]

In Havens' luggage T-shirts were found. They were not Havens' size, and they had been cut up in a manner suggesting, according to the government, that portions of them had been used to make the pockets for the shirt McLeroth had used to smuggle cocaine (Supp. Tr. 12-13). The government advanced no theory to explain why Havens was returning from South America with remnants of a shirt manufacturing process allegedly completed weeks earlier in Indiana, prior to a previous trip.

Notwithstanding the fact that the shirts in Havens' luggage had been properly suppressed as evidence prior to trial, the government undertook to introduce them in evidence.

Because respondent offered no testimony on direct examination concerning the contents of his luggage, and offered no testimony about T-shirts, the government attempted to create, solely through cross examination, a conflict in testimony through which the introduction of the T-shirts could be justified on the ground of impeachment. Accordingly, the prosecutor handed the suppressed evidence to Havens, in the presence of the jury, and inquired if his luggage had contained the shirts on the day of Havens' arrest. Havens testified that he had no knowledge of the T-shirts being in his luggage until the following day, when the luggage contents were inventoried in his presence at DEA headquarters (Tr. 405-407). Havens testified that he told the DEA agent at that time that the shirts were not his size, but were probably McLeroth's size, saying "He is somewhat smaller than I." (Tr. 405-406).[6]

5. Havens' luggage was seized, without a warrant, from the baggage compartment of the domestic air carrier he was planning to board. Prior to trial the court held the seizure to be unlawful, and the contents of Havens' luggage were ruled suppressed as evidence. (Motion to Suppress Hearing, January 18, 1978.)

6. It should be noted that no waiver is involved, as defense counsel made appropriate protest against the actions of the prosecution detailed herein (Tr. 397-398).

A DEA agent then testified in rebuttal that he had made Havens aware that the cut up T-shirts were in his luggage on the day of his arrest, not on the following day (Tr. 438-441). The trial judge thereupon permitted the shirts to be introduced in evidence, vigorously used by the government in final argument, and to be taken into the jury room during deliberations (Tr. 441, Supp. Tr. 12-13).[7]

The trial judge permitted this in the erroneous belief that it was permitted under recent decisions of the Supreme Court, notably *Harris* v. *New York*, 401 U. S. 222 (1971) and *Oregon* v. *Hass*, 420 U. S. 714 (1975) (note comments of the court at Tr. 393-395).

On appeal the government also argued unsuccessfully that a portion of Havens' testimony on direct examination was sufficient to permit the introduction of the T-shirts in evidence for purposes of impeachment. The relevant testimony by Havens is set forth at page 4 of the government's petition. The testimony concerns the final trip Havens and McLeroth made in late September, 1977, which trip led to their arrest.[8] It should be noted that this testimony is not contradicted by the government. On the contrary, as discussed above, the government contended that the wrapping and taping was discontinued after the first trip in April, when the pocketed shirt was substituted for use in later trips.

In any event, it is abundantly clear that no direct testimony of any kind was offered concerning the suppressed evidence, and

7. During final argument, the prosecutor said to the jury, "Now, the government's going to ask you when you take back all of the evidence to take the two T-shirts, size 38, size 40, and compare them with Government's Exhibit 3." (Supp. Tr. 12-13).

Note: Exhibit 3 includes the pocketed T-shirt used by McLeroth to smuggle cocaine (Tr. 23).

8. The questioning refers to the "fourth trip" to Lima Peru. It was Havens fourth trip, and the third trip in McLeroths company. Havens testified that he made a trip alone in the summer of 1977 to further a medical equipment supply business he was attempting to establish (Tr. 352-353).

the only conflict on cross examination was whether Havens was made aware of the suppressed evidence on the day of his arrest or on the following day.

II.

ARGUMENT.

The opinion in this case by the Court of Appeals for the Fifth Circuit is set forth in Appendix A of the government's petition.[9] That opinion was based principally on *Agnello* v. *United States*, 269 U. S. 20 (1925). Quite simply, *Agnello* held that suppressed evidence cannot be used to rebut cross examination testimony, where no direct testimony about the suppressed evidence was introduced. Cases following *Agnello* are both numerous and consistent in the application of this rule.[10]

The government, however, seeks to have *Agnello* overruled.[11] It seeks the power, on cross examination, to confront a defendant with suppressed evidence which was not the subject of testimony on direct examination, and to interrogate him about that evidence under cover of impeachment. Regarding this, the Court of Appeals said in the present case,

> "According to the view of the trial judge and the prosecutor, defendant could be asked on cross-examination a question, which answered affirmatively would admit the incriminating tendencies of the illegal evidence, and, answered negatively would allow the subsequent introduction of the illegal evidence for purposes of impeachment."[12]

If the government's view in this case were to prevail, the deterrent to violation of Fourth Amendment rights would cease

9. Citations to particular portions of the Court of Appeals opinion will refer to pages in Appendix A of the government's petition.

10. *United States* v. *Mariani*, 539 F. 2d 915 (2d Cir. 1976) *United States* v. *Trejo*, 501 F. 2d 138 (9th Cir. 1974).

11. Page 17, government petition.

12. Page 8a, Appendix A.

to exist. Illegally obtained evidence might not be used in the government's case in chief, but the effect of such evidence would be equally damaging if routinely introduced by the prosecution during cross-examination.

Alternatively, the government seeks a review of this case for the Court to decide "to what extent it [*Agnello*] should be limited in light of *Harris* and *Hass*."[13]

It is submitted that *Harris* v. *New York, supra* and *Oregon* v. *Hass, supra* are not inconsistent with *Agnello,* and further, that the limitations contained therein are clearly stated. Both *Harris* and *Hass* dealt with incriminating statements given to police officers. The statement were inadmissable at trial because of "Miranda"[14] violations. In both cases statements were made on direct examination which contradicted the prior, inadmissable statements. In each case the use of the prior, inconsistent statement was permitted for purposes of impeachment.

It is clear that these cases have no application to the case at hand. In this case, at the time of Havens' arrest and at all times thereafter, including trial, he represented himself to be solely engaged in legitimate business. No prior, inconsistent statements are involved as in *Harris* and *Hass*. Absolutely no testimony was offered on direct examination regarding the suppressed material. Moreover, by the government's own account, there was no draping and taping of McLeroth's body on the "fourth trip". Where then, is the false testimony which the government seeks to impeach? The answer is obvious. There is none.

13. Page 17, government's petition.
14. *Miranda* v. *Arizona,* 384 U. S. 436 (1966).

CONCLUSION.

The government must not be permitted, in the guise of truth seeking, to subvert and ultimately destroy the Fourth Amendment to the United States Constitution. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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803 South Calhoun Street,
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Attorney for Respondent.

APPENDIX.

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
Washington, D. C. 20543

September 12, 1979

J. Lee Havens, Esq.
6410 Sharon Drive
Fort Wayne, Indiana 46825

Re: United States v. J. Lee Havens
No. 79-305

Dear Mr. Havens:

Your request of September 11, 1979, for an extension of time within which to file a response to the petition for a writ of certiorari in the above-entitled case is granted and the time has been extended to and including October 29, 1979.

No further extension will be granted by the Clerk to file this brief.

Very truly yours,

/s/ Michael Rodak, Jr.
Michael Rodak, Jr.
Clerk

cc: The Hon. Wade H. McCree, Jr.
Solicitor General of the U. S.
Department of Justice
Washington, D. C. 20530

AIR MAIL

Supreme Court, U. S.
FILED
JAN 19 1980

No. 79-305

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

J. LEE HAVENS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-305

UNITED STATES OF AMERICA, PETITIONER

v.

J. LEE HAVENS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 592 F.2d 848.

JURISDICTION

The judgment of the court of appeals (Pet. App. 10a) was entered on April 5, 1979. A timely petition for rehearing was denied on June 27, 1979 (Pet. App. 11a-12a). Mr. Justice Powell extended the time for

filing a petition for a writ of certiorari to and including August 26, 1979 (Pet. App. 13a). The petition for a writ of certiorari was filed on August 24, 1979, and was granted on November 26, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether evidence suppressed as the fruit of an unlawful search and seizure may nevertheless be used to impeach a defendant's false trial testimony, given in response to proper cross-examination, where the evidence does not squarely contradict the defendant's testimony on direct examination.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, respondent was convicted of possessing cocaine with intent to distribute it and of importing and conspiring to import cocaine, in violation of 21 U.S.C. 841(a)(1), 952(a), 960(a)(1), and 963. He was sentenced to

three concurrent eight-year terms of imprisonment, to be followed by a special parole term of three years, and to a fine of $5,000.

The evidence showed that on October 2, 1977, respondent and John Kenneth McLeroth, both attorneys from Fort Wayne, Indiana, arrived at the Miami Airport on a flight from Lima, Peru (A. 3-4, 10-11, 14-15, 30). McLeroth underwent a customs search, which revealed 13 bags containing more than three pounds of cocaine sewed into 12 makeshift pockets in a T-shirt under his clothing (A. 3-9). He advised customs officials that respondent was travelling with him, and he implicated respondent in the importation of the cocaine (A. 9-13, 29). DEA and customs agents then found respondent, who had already cleared customs approximately four hours earlier (A. 14). The agents retrieved respondent's luggage and searched it without a warrant (Pet. App. 2a). Inside the luggage, the agents found two medium-sized T-shirts. One of them had pieces cut out of it that corresponded to the pockets sewed into McLeroth's T-shirt (A. 36-38). After a hearing prior to trial, the court suppressed the two T-shirts found in respondent's luggage on the ground that the search of the luggage violated respondent's Fourth Amendment rights.[1]

---

[1] The government did not appeal the suppression order because it was felt that there was sufficient evidence against respondent even without the suppressed evidence. Nor did the government suggest on defendant's appeal that the evidence was the product of a lawful border search, although

After pleading guilty, McLeroth testified for the government at respondent's trial. He discussed several trips that he and respondent had made to Peru.[2] He also testified that respondent had supplied him with the altered T-shirt (A. 21) and had sewed the pockets of the T-shirt closed to prevent the bags from falling out (A. 27-28).

Respondent testified in his own defense and denied any involvement in cocaine smuggling (A. 30-31, 33-34). His direct testimony then continued as follows (A. 34):

---

we believe the search could have been upheld on that ground. See *United States* v. *Walters*, 591 F.2d 1195, 1197-1198 (5th Cir. 1979); *United States* v. *Wardlaw*, 576 F.2d 932, 935 (1st Cir. 1978). See also *United States* v. *Nieves*, No. 79-1051 (2d Cir. Oct. 30, 1979), slip op. 5325-5327, petition for cert. pending *sub nom. Figueroa* v. *United States*, No. 79-5702; *United States* v. *Golden*, 532 F.2d 1244 (9th Cir.), cert. denied, 429 U.S. 842 (1976); *United States* v. *Glaziou*, 402 F.2d 8 (2d Cir. 1968), cert. denied, 393 U.S. 1121 (1969); *United States* v. *McGlone*, 394 F.2d 75, 78 (4th Cir. 1968). Since we did not argue in the court of appeals that the search was a permissible border inspection, we do not make that contention here.

[2] During the first trip, in April 1977, McLeroth had smuggled approximately four pounds of cocaine into the country in bags taped to his body by an elastic bandage, for which he received $15,000 from respondent (A. 17-20). In early June 1977, respondent made a second trip to Lima alone. Upon his return, respondent informed McLeroth that his connection in Lima "was very apprehensive and was not about to provide any further cocaine source at that time" (A. 20). The third trip, in early September 1977, was unsuccessful because the "source" in Lima had been arrested (A. 21-23). The fourth trip ended with respondent's arrest.

Q. And you heard Mr. McLeroth testify earlier as to something to the effect that this material was taped or draped around his body and so on, you heard that testimony?

A. Yes, I did.

Q. Did you ever engage in that kind of activity with Mr. McLeroth and Augusto or Mr. McLeroth and anyone else on that fourth visit to Lima, Peru?

A. I did not.

* * * * *

Q. I will ask you whether or not you were arrested with cocaine on your body or luggage or anywhere else.

A. No, I was not.

On cross-examination, respondent testified as follows (A. 35):

Q. Now, on direct examination, sir, you testified that on the fourth trip you had absolutely nothing to do with the wrapping of any bandages or tee shirts or anything involving Mr. McLeroth; is that correct?

A. I don't—I said I had nothing to do with any wrapping or bandages or anything, yes. I had nothing to do with anything with McLeroth in connection with this cocaine matter.

* * * * *

Q. And your testimony is that you had nothing to do with the sewing of the cotton swatches to make pockets on that tee shirt?

A. Absolutely not.

Q. Sir, when you came through Customs, the Miami International Airport, on October 2, 1977,

did you have in your suitcase Size 38-40 medium tee shirts? [3]

Defense counsel objected to this question (A. 36), but, after some discussion, the court overruled the objection and permitted the prosecutor to pursue that line of questioning, which continued as follows (A. 46):

> Q. On that day, sir, did you have in your luggage a Size 38-40 medium man's tee shirt with swatches of clothing missing from the tail of that tee shirt?
>
> A. Not to my knowledge.
>
> * * * * *
>
> Q. Mr. Havens, I'm going to hand you what is Government's Exhibit 9 for Identification and ask you if this tee shirt was in your luggage on October 2nd, 1975 [*sic*]?
>
> A. Not to my knowledge. No.

Respondent further denied having told a DEA agent that the T-shirts found in his suitcase belonged to McLeroth (A. 47-48).

On rebuttal the government called the agent, who testified that he had found T-shirts, including Government Exhibit 9, in respondent's suitcase and that respondent had stated at that time that they belonged to McLeroth (A. 50-52). The court instructed the jury that this evidence was to be considered only for the purpose of impeaching respondent's credibility (A. 44; Tr. 412-413).

---

[3] Respondent had testified that he wears a size 44-46 T-shirt. (A. 35).

Relying primarily on *Agnello* v. *United States*, 269 U.S. 20 (1925), and *Walder* v. *United States*, 347 U.S. 62 (1954), the court of appeals reversed respondent's conviction. The court stated that those cases provide that illegally seized evidence may be used for impeachment only if the predicate for its use is found in the defendant's direct examination and only if the evidence contradicts a particular statement made by the defendant (Pet. App. 6a-7a). Applying these principles, the court held that since respondent was not asked and did not testify about the T-shirt or the contents of his luggage until cross-examination, this case "falls squarely within" this Court's decision in *Agnello*, and the evidence was not admissible even for the limited purpose of impeachment (Pet. App. 9a).

SUMMARY OF ARGUMENT

This case concerns the admissibility, for purposes of impeaching a defendant's testimony, of physical evidence seized in an illegal search. We contend that the court of appeals erred on two grounds in excluding the evidence. First, the court was incorrect in holding that illegally seized evidence may never be introduced to impeach false testimony given on cross-examination. Second, even if the court was correct in so holding, the court erred in ruling that respondent's direct testimony was not sufficiently in conflict with the suppressed evidence to authorize the use of that evidence for impeachment.

I.

A. This Court has never specifically considered the question whether illegally seized evidence is admissible to impeach testimony given in response to cross-examination properly within the scope of the defendant's direct examination. In *Agnello* v. *United States*, *supra*, the Court held that certain illegally seized evidence could not be admitted to impeach the defendant's denial on cross-examination that he had ever seen that evidence. The Court relied on the proposition that illegally seized evidence "shall not be used at all" and noted that the defendant had said nothing on his direct examination to justify cross-examination with respect to the illegally seized evidence. The Court has since rejected the principal premise of *Agnello* and has permitted illegally obtained evidence to be used in a number of contexts, including for impeachment of a defendant's false testimony in *Walder* v. *United States*, *supra*, *Harris* v. *New York*, 401 U.S. 222 (1971), and *Oregon* v. *Hass*, 420 U.S. 714 (1975). Weighing the costs to the integrity of the trial process against the deterrence policy of the exclusionary rule, the Court has found that the use of the evidence for impeachment must be permitted and that the deterrence policy of the exclusionary rule is satisfied by excluding the evidence from the prosecution's case in chief. *Harris*, *supra*, 401 U.S. at 225. Because those cases permitting the use of the evidence involved impeachment of direct testimony, and even *Agnello*, whose rationale has since been abandoned, involved cross-examination

found to have exceeded the scope of direct testimony, the Court has never specifically decided the propriety of the use of illegally seized evidence for impeachment purposes when the false testimony is given in response to proper cross-examination questions.

B. The distinction between direct examination and cross-examination upon which the court of appeals' ruling is predicated cannot be sustained. The two aspects of a witness's testimony are interwoven parts of an indivisible legal whole. A rule that countenances false testimony on cross-examination has the same pernicious consequences for the integrity of the trial process as one that allows false direct testimony to go unchallenged. The witness who takes the stand to tell his story must answer all pertinent questions about it, *Brown* v. *United States*, 356 U.S. 148, 154-155 (1958), and so long as the prosecutor does not exceed the liberal limits established for cross-examination of the defendant's direct testimony, he cannot properly be accused of "smuggling in" impermissible material even if he asks questions that, if truthfully answered, would disclose information also evidenced by illegally seized items. In our adversary system, cross-examination is the primary means of testing the veracity of the story told by a witness on his direct examination and clarifying ambiguities or filling gaps in the direct testimony, and cross-examination cannot be effective, as a practical matter, if the witness is free to answer questions falsely without fear of impeachment. See *Davis* v. *Alaska*, 415 U.S. 308, 314-318 (1974).

The effect of the exclusion of highly probative evidence from impeachment of any testimony, cross as well as direct, can only be to encourage defendants to present false defenses, giving them the "license to commit perjury" (*Glickstein* v. *United States*, 222 U.S. 139, 142 (1911)) that this Court has often counseled against. Moreover, permitting impeachment does not impermissibly infringe on the defendant's right to testify in his own behalf, because his decision to take the stand carries with it the obligation to testify truthfully and to respond to proper cross-examination. See *United States* v. *Grayson*, 438 U.S. 41 (1978).

C. In considering the proper application of the exclusionary rule, the costs of exclusion must be weighed against the potential benefits that may be expected in terms of deterrence of illegal police conduct. It is evident, we believe, that the costs of the rule adopted by the court of appeals far outweigh any incremental deterrence benefits that could possibly be gained. The unavailability of illegally seized evidence for use in the prosecution's case in chief completely destroys the possibility of a successful prosecution in many cases, which can reasonably be expected to serve as a material deterrent to official misconduct. If the Court adopts the rule for which we contend, suppressed evidence will remain inadmissible unless several conditions coincide—the defendant chooses to testify, the nature of his testimony is such that proper cross-examination can explore subject matter to which the illegally seized evidence relates, and his testimony on cross-examination is

false. This Court has characterized as "speculative" (*Harris*, *supra*, 401 U.S. at 225; *Oregon* v. *Hass*, *supra*, 420 U.S. at 723) the prediction that the potential availability of illegally seized evidence for impeachment purposes would significantly encourage police misconduct. Any incremental deterrence that might result from limiting impeachment to false testimony on direct examination is even more speculative and can only be deemed insignificant. It should not outweigh the policy of discouraging false testimony at trial.

Accordingly, we submit that illegally seized evidence must be admissible to impeach false testimony given in response to cross-examination questions properly within the scope of a defendant's direct testimony. The Court's decision in *Agnello* is not inconsistent with this position because of the Court's finding there that the cross-examination was improper; but to the extent *Agnello* is read to be inconsistent with our position, it should be overruled.

II.

Assuming that the court of appeals correctly held that illegally seized evidence may be used for impeachment only of testimony given on direct examination, the court erred in holding that respondent's direct testimony was not impeachable. While that testimony did avoid specific reference to the suppressed evidence, respondent's general reference to lack of involvement in "that kind of activity" was calculated to suggest to the jury a denial of Mc-

Leroth's testimony that respondent assisted in concealing the cocaine for smuggling. This denial was impeachable by the suppressed evidence. The Fifth Circuit's requirement that a particular statement of the defendant on direct examination be directly contradicted by the evidence establishes a more restrictive standard for admissibility than heretofore suggested by any other court of appeals. If this standard is adopted, the threat of impeachment that ordinarily should deter defendants from giving perjured testimony will be of no practical significance in a case like this, because defendants will be able to tailor their direct testimony to avoid impeachment while still effectively denying the inferences to be drawn from the suppressed evidence.

ARGUMENT

The court of appeals held that the trial court erred in admitting the suppressed evidence of the T-shirts for impeachment purposes, ruling that *Agnello* v. *United States*, *supra*, and *Walder* v. *United States*, *supra*, establish two requirements for the use of illegally seized evidence for impeachment purposes. First, the predicate for its use must be found in the direct examination of the defendant. Second, the impeachment evidence must contradict a particular statement made by the defendant (Pet. App. 6a-7a). We contend that the court erred on both counts. In Part I, *infra*, we argue that the policies of the exclusionary rule and the decisions of this Court do not support the existence of a distinction in the use of

illegally seized evidence between impeachment of a defendant's false testimony on direct examination and impeachment of a defendant's false testimony on proper cross-examination. In Part II, *infra*, we contend that, even if such a distinction between direct and cross-examination testimony is sound, the court of appeals erroneously restricted the scope of this Court's decisions in *Walder* and *Harris* v. *New York*, *supra*, in holding that the suppressed evidence in this case did not sufficiently contradict the direct testimony of the defendant to justify its use for impeachment purposes.

I. ILLEGALLY SEIZED EVIDENCE MAY BE ADMITTED FOR THE PURPOSE OF IMPEACHING FALSE TESTIMONY GIVEN BY A DEFENDANT IN RESPONSE TO PROPER CROSS-EXAMINATION QUESTIONS

A. The Decisions Of This Court Do Not Establish A Distinction Between Impeachment Of Direct Testimony And Impeachment Of Cross-Examination Testimony

This Court first considered the question of the admissibility of illegally seized evidence in response to the testimony of a defendant in *Agnello* v. *United States*, 269 U.S. 20 (1925). In that case, the defendant was indicted for conspiracy to sell a package of cocaine. On direct examination, he admitted receiving the packages in question, but testified that he did not know what was in the packages and would not have carried them if he had known that they contained cocaine. On cross-examination, the defendant

denied ever having seen narcotics before. At that point, the defendant was asked if he had ever seen a particular can of cocaine before; the can had been seized earlier from the defendant's bedroom pursuant to an illegal search. When the defendant denied ever having seen the can of cocaine, the trial court permitted the government to introduce it into evidence in rebuttal. 269 U.S. at 29-30. This Court held that the evidence was improperly admitted, citing *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 (1920), for the proposition that illegally seized evidence "shall not be used at all." The Court also noted that the defendant had not testified concerning the can of cocaine on his direct examination and had done nothing "to justify cross-examination in respect of the [illegally seized] evidence." 269 U.S. at 35.

This Court first limited the implications of *Agnello* in *Walder* v. *United States*, 347 U.S. 62 (1954). In 1950, a heroin capsule was found in the defendant's possession during an illegal search. When a motion to suppress the heroin was granted, the case against the defendant for possession of narcotics was dismissed. In 1952, the defendant was indicted on new charges based on eyewitness testimony that he engaged in narcotics transactions. On direct examination, the defendant testified that he had never possessed narcotics. The Court held that the trial court properly admitted for impeachment purposes the evidence of the heroin capsule illegally seized two years earlier. The Court stated (347 U.S. at 65):

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the *Weeks* doctrine would be a perversion of the Fourth Amendment.

Thus, at a minimum, the Court rejected the statement in *Agnello* that tainted evidence could not be used for impeachment purposes at all. The Court distinguished *Agnello*, however, on the basis that the government there sought to "smuggle in" the tainted evidence on cross-examination, quoting the Court's finding in *Agnello* that the defendant did nothing to justify the cross-examination that led to the false testimony. 347 U.S. at 66.

In *Harris* v. *New York*, 401 U.S. 222 (1971), the Court once again considered the use of illegally procured evidence to impeach a defendant's testimony at trial. The defendant was charged with making two sales of heroin to an undercover agent. On his direct testimony, the defendant denied making one of the sales and claimed that the second sale was of baking powder, not heroin. On cross-examination, he was asked about statements that he had made to the police after his arrest that were inconsistent with his trial testimony. These statements were not admissible in the prosecution's case in chief because they had been made without the benefit of proper *Miranda* warn-

ings. The trial judge instructed the jury that the statements attributed to the defendant by the prosecution were admissible for impeachment purposes only, not as evidence of guilt.

This Court agreed that the statements were properly admitted. It specifically rejected the notion that the use of suppressed evidence for impeachment that was approved in *Walder* was limited to testimony on collateral matters.[4] The Court focused on the importance of impeachment to the truth-finding objective of the trial and noted that the defendant's right to testify did not give him the right to commit perjury. The Court explained (401 U.S. at 225; footnote omitted):

> Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process.

The policies of the exclusionary rule did not, in the Court's view, require that the prosecution be denied the right to impeach and forced to allow the defendant's perjury to go unchallenged. The Court found that there was only a "speculative possibility" that its decision would encourage impermissible police conduct and ruled that "sufficient deterrence [of unlawful police conduct] flows when the evidence in

[4] The Court made no distinction between the statements introduced in *Harris* and the physical evidence introduced in *Walder*.

question is made unavailable to the prosecution in its case in chief." 401 U.S. at 225.

Clearly, the approach taken in *Harris* is completely at odds with the rationale of *Agnello*. *Agnello* did not consider the serious impact upon the truth-seeking function of a trial that is engendered by denying the ability to impeach perjured testimony; it relied simply on the absolutist view that illegally seized evidence can never be used at trial. *Harris*, on the other hand, weighed the benefits of the policies of discouraging perjury and eliciting the truth at trial against the deterrence effect that could result from excluding the evidence and concluded that the interests in question were best balanced by admitting the evidence.

The Court again applied the *Harris* analysis in *Oregon* v. *Hass*, 420 U.S. 714 (1975). There, police arrested the defendant on suspicion of bicycle theft. While in a patrol car en route to the site where one of the bicycles was hidden, the defendant stated that he wanted to speak to his attorney. Certain statements and identifications obtained subsequent to that time but before the defendant was given an opportunity to speak to his attorney were suppressed on the authority of *Miranda*. When the defendant testified in his defense and denied pointing out to police two residences from which the bicycles were stolen, the prosecution was permitted to introduce for impeachment purposes the defendant's inconsistent statements made at the time of his arrest. The Court again upheld the use of the evidence for impeach-

ment, stating: "inadmissibility would pervert the constitutional right into a right to falsify free from the embarrassment of impeachment evidence." 420 U.S. at 723. It reiterated the position that the exclusionary rule does not prevent admission of the evidence because "there is sufficient deterrence when the evidence in question is made unavailable to the prosecution in its case in chief." 420 U.S. at 722.

Despite the strong policy favoring impeachment of perjured testimony enunciated in *Harris* and *Hass*, the court of appeals here held that the suppressed evidence was inadmissible to impeach false testimony given in response to cross-examination. Its view is in accord with the rule applied by other courts of appeals, which have similarly distinguished between direct and cross-examination. See *United States* v. *Hickey*, 596 F.2d 1082 (1st Cir. 1979); *United States* v. *Whitson*, 587 F.2d 948 (9th Cir. 1978); *United States* v. *Mariani*, 539 F.2d 915 (2d Cir. 1976). However, the lower courts generally have not made this distinction through a reasoned application of the considerations applied in *Harris*,[5] but have done so as a means of reconciling the holdings of *Harris* and *Agnello*.[6]

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[5] Indeed, the court of appeals in this case made no reference at all to the policies of ascertaining the truth at trial and discouraging perjury.

[6] The First Circuit has reached this result reluctantly, questioning the logic of such a distinction as "artificial" for "allowing a defendant to lie safely on cross-examination but not on direct." *United States* v. *Hickey*, *supra*, 596 F. 2d at 1088. See also *United States* v. *Whitson*, *supra*, 587 F. 2d at 953 (Kilkenny, J., concurring and dissenting):

> It is wholly illogical to hold that a defendant may not hide beyond the shield of the *Miranda* rule if he perjures himself on direct examination, but may invoke the protection of *Miranda* if he perjures himself on the same subject matter on cross-examination.

This method of reconciliation derives from the Court's statement in *Walder* distinguishing *Agnello* on the ground that the prosecution there sought to "smuggle in" tained evidence on cross-examination. This Court has never stated, however, that the use of suppressed evidence for impeachment does not apply to impeachment of cross-examination testimony, and *Walder* need not be read to endorse such a sweeping proposition. The statement in *Walder* simply refers to the Court's finding in *Agnello* that the cross-examination questions that elicited the false testimony were outside the scope of the direct testimony. A prosecutor who properly limits his cross-examination to the scope of the defendant's direct testimony cannot validly be accused of trying to "smuggle in" impermissible material on cross-examination. The attempt to read *Walder* more broadly to establish a general rule prohibiting the impeachment of any cross-examination testimony with illegally seized evidence is clearly inconsistent with the subsequent statements in *Harris* and *Hass* that the purposes of the exclusionary rule are adequately served by denying the prosecution the right to use illegally seized evidence in its case in chief.

The actual holdings of *Agnello* and *Harris* can, it is true, be reconciled by drawing the distinction be-

tween direct and cross-examination that the court of appeals drew in the instant case. By the same token, they can also be reconciled by limiting the prohibition of *Agnello* to cases in which the cross-examination is beyond the scope of the direct examination or in which the cross-examination question involved was suggested solely by the tainted evidence.[7] Attempting to reconcile the holdings of *Agnello* and *Harris*, however, when their underlying rationales are fundamentally inconsistent, simply begs the question. The fact is that the Court has not yet squarely faced the question whether impeachment of false testimony with illegally seized evidence should be barred when the perjury occurs in response to proper cross-examination. This question should, we submit, be decided by applying the modern analysis set out in *Harris* and *Hass*—examining both the impact on the truth-finding function of the trial and the policy reasons for applying the exclusionary rule in such

[7] It may well be that the Court in *Agnello* relied on this last ground, that the cross-examination question was a "fruit" of the illegal seizure, in forbidding the introduction of the tainted evidence. The citation of *Silverthorne Lumber Co.* v. *United States, supra,* relates most closely to this theory. In *Silverthorne,* the government returned records that had been illegally seized but sought to use information that it acquired from reading the records while they were in its possession. Similarly, the Court in *Agnello,* in noting that the cross-examination questions were not suggested by the direct testimony, seems to be implying that the questions were suggested solely by the knowledge of the illegally seized evidence and thus that asking the questions was a means of using the suppressed evidence. Here, the line of questioning was not itself a "fruit" of the illegal seizure, but rather had an independent untainted source. See note 15, *infra.*

a situation—rather than the long-discarded principle of *Agnello* that all use of illegally seized evidence in judicial proceedings is absolutely barred.

B. The Rule Adopted By The Court Of Appeals Undermines The Integrity Of The Judicial Process By Permitting Perjury To Go Unchallenged

The fundamental goal of a trial in our legal system is the ascertainment of the truth, as long as the process complies with constitutional safeguards. See *Oregon* v. *Hass, supra,* 420 U.S. at 722. It is critical to the achievement of this goal and to the integrity of the judicial process that witnesses tell the truth when they are called to testify. The decision of the court of appeals, in permitting perjured testimony to go unchallenged, is at odds with the strong policy of discouraging perjury that this Court has found necessary to safeguard that judicial integrity.

In holding that a defendant can be prosecuted for perjury even if his allegedly false grand jury testimony was procured without *Miranda* warnings, the Court has stated that "[p]erjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are therefore imperative." *United States* v. *Mandujano,* 425 U.S. 564, 576 (1976) (plurality opinion). See also *United States* v. *Wong,* 431 U.S. 174 (1977). Indeed, the policy against false testimony is so strong that the fact that a person was unconstitutionally compelled to respond to certain questions is not a defense to a prosecution for making false statements in violation

of 18 U.S.C. 1001. When a person is unlawfully required to answer questions, his proper remedy is to challenge the lawfulness of the requirement, but he may not "with impunity knowingly and willfully answer with a falsehood." *Bryson* v. *United States*, 396 U.S. 64, 72 (1969). See also *United States* v. *Knox*, 396 U.S. 77 (1969). Certainly, when the defendant voluntarily takes the stand and is asked proper questions that do not violate his constitutional rights, he is "under an obligation to speak truthfully and accurately." *Harris*, *supra*, 401 U.S. at 225.

This Court recognized in *Harris* that a rule insulating the defendant from impeachment of his false testimony by illegally seized evidence perverts the shield of the exclusionary rule into a "license to use perjury." 401 U.S. at 226. Yet the court of appeals has held that such impeachment is permissible only when the false testimony occurs on direct examination. This distinction between direct examination and cross-examination is an artificial one that provides no basis for applying different standards for impeachment of perjured testimony. False testimony on cross-examination is no less insidious than false testimony on direct examination.

When a witness takes the stand, cross-examination is the primary device for testing the veracity of his testimony and ensuring that the testimony does not contain strategic omissions. See *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974); *Chambers* v. *Mississippi*, 410 U.S. 284, 295 (1973); *Hoffa* v. *United States*, 385 U.S. 293, 311 (1966). Indeed, cross-examination is

so critical to the judicial process that its availability to defendants is one of the fundamental rights that is protected by the Sixth Amendment. See *Pointer* v. *Texas*, 380 U.S. 400 (1965). In any realistic sense, cross-examination is part and parcel of the witness's testimony and cannot logically be separated from his direct testimony. Thus, once a defendant takes the stand, he cannot assert his Fifth Amendment privilege against legitimate cross-examination questions. *Brown* v. *United States*, 356 U.S. 148, 154-155 (1958).

The decision of the court of appeals in this case severely restricts the ability of the prosecution to conduct effective cross-examination and thereby require the defendant to tell the whole story, not just those portions that he wishes to tell.[8] The court's decision does not specifically forbid the government from asking certain cross-examination questions,[9] but it does prevent the government from using evidence in its possession to impeach false answers to its questions. The right to impeach a witness is as important a part of the right to cross-examine as

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[8] As a general rule, the need for searching cross-examination to ensure that the truth is brought out is strongest when the defendant is on the stand, because he generally has the most to gain and least to lose from testifying falsely. See *Doyle* v. *Ohio*, 426 U.S. 610, 629 n.8 (1976) (Stevens, J., dissenting).

[9] Such a prohibition has been suggested by one court of appeals. The Ninth Circuit has stated that a trial court should not permit a question on cross-examination if the only evidence that can support the inquiry is inadmissible. *United States* v. *Whitson*, *supra*, 587 F. 2d at 952-953 n.6.

the right to delve into his story. See *Davis* v. *Alaska*, *supra*, 415 U.S. at 316. Manifestly, the ability to ask a question when the witness's false answer to that question cannot be impeached simply does not constitute effective cross-examination. *Id.* at 318. In accordance with these principles, the Court has held that it was proper for a district court to preclude a defense investigator from taking the stand unless he made his report available to the prosecution for possible use in impeaching his credibility. *United States* v. *Nobles*, 422 U.S. 225 (1975). The Court stated (422 U.S. at 241):

> The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth. * * * [I]t was within the court's discretion to assure that the jury would hear the full testimony of the investigator rather than a truncated portion favorable to [the defendant].

The practical impact of the court of appeals' decision on the government's ability to cross-examine and establish whether the defendant's direct testimony is the whole story or a half-truth is illustrated by the facts of this case. Here, McLeroth, the government's witness, testified that respondent assisted him in wrapping bags of cocaine around him with bandages and in preparing a T-shirt for smuggling cocaine. Respondent testified on his direct examination that he had nothing to do with the draping of

material around McLeroth's body or "that kind of activity" on the fourth trip to Peru (A. 34). This statement could easily have been interpreted by the jury as a denial of McLeroth's testimony that respondent was involved in preparing the T-shirt. Since an important function of cross-examination is to require a witness to clarify vague assertions and make them specific, a proper and obvious line of cross-examination was to ask respondent specifically about his role in preparing the T-shirt. Similarly, respondent asserted on his direct examination that no cocaine was found in his luggage (A. 34). It was logical to ask him on cross-examination whether any evidence of the crime other than cocaine was found in his luggage. Yet the rule propounded by the court of appeals prevents either of these lines of cross-examination from being pursued effectively because the respondent, himself an attorney, could and did feel free to lie and to tailor misleading testimony in reliance on the assumption that evidence of his mendacity could not be introduced. Compare *Davis* v. *Alaska*, *supra*, 415 U.S. at 314-318.

Moreover, the rule for which we contend—permitting unlawfully seized evidence to be introduced to impeach false answers given in response to proper cross-examination questions—would not impermissibly burden the defendant's right to testify in his own behalf. In deciding whether to take the stand, a defendant must consider the possibility that he will be impeached by evidence of prior convictions, *Spencer* v. *Texas*, 385 U.S. 554, 561 (1967), and that

his direct testimony may be impeached by use of illegally seized evidence under *Harris*. The additional possibility that testimony on cross-examination may be impeached by use of illegally seized evidence is a consequence of the fact that he is obligated to respond to proper cross-examination questions even though that may prove damaging to his defense. See *Brown* v. *United States*, *supra*. Still, it is not considered unfair that the defendant be forced to consider the risks of cross-examination before deciding to take the stand. *McGautha* v. *California*, 402 U.S. 183, 215 (1971).

Thus, the appropriateness of the requirement that the defendant face the risks of impeachment with illegally seized evidence does not depend upon whether that impeachment is limited to false testimony on direct examination. Even if false answers on cross-examination may be impeached, it is clear that the burden of decision placed upon the defendant is no greater than that under *McGautha*, *Spencer* and *Harris*. When a defendant elects to tell his side of the story, his Sixth Amendment right to present a defense does not entitle him to avoid having the whole story told. See *United States* v. *Nobles*, *supra*, 422 U.S. at 241.

Moreover, the possibility of impeachment with tainted evidence arises only if the defendant gives false or misleading testimony. It is clear that the right of a defendant to testify in his own behalf does not include the right to commit perjury. Thus, even assuming that the possibility of impeachment has a

"chilling effect on a defendant's decision to testify falsely, that effect is entirely permissible." *United States* v. *Grayson*, 438 U.S. 41, 54 (1978).[10]

In sum, we submit that a rule excluding illegally seized evidence from use for impeachment purposes whenever the false testimony sought to be impeached was given in response to cross-examination seriously impinges on the integrity of the judicial process. In our adversary system, direct and cross-examination are inextricably intertwined components of an integrated whole. In making an artificial distinction between direct examination and cross-examination, the court of appeals' rule inhibits the ability of the prosecution to cross-examine the defendant effectively and permits false testimony to stand unchallenged despite its inconsistency with probative and trustworthy evidence.[11] *Harris* has indicated that these considerations

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[10] In *Grayson*, the Court considered whether a judge could take into account in sentencing the fact that the defendant presented a false defense. The Court held that consideration of such a factor did not impermissibly chill a defendant's right to testify because there was no right to commit perjury. This case presents even less of a problem of possible "chilling" of a defendant's rights than did *Grayson*. In *Grayson*, it is conceivable that a defendant who was planning to testify truthfully would be afraid to take the stand because of the possibility that the judge would mistakenly believe that he was presenting a false defense. In this case, there is no possibility of introduction of the impeaching evidence unless the defendant actually testifies to matters that are contradicted by that evidence.

[11] Illegally seized physical evidence is no less trustworthy than legally seized evidence. The evidence involved in this case is even more trustworthy than the evidence admitted in

militate in favor of the admissibility of such evidence for impeachment purposes. Accordingly, the decision of the court of appeals rejecting the admissibility of the evidence can be supported, if at all, only on the basis that overriding policies of the exclusionary rule require suppression when the testimony is given on cross-examination. We now turn to consideration of the extent to which the court of appeals' decision would serve the policies of the exclusionary rule.

C. The General Purposes And Policies Of The Exclusionary Rule Do Not Require The Exclusion For Impeachment Purposes Of Evidence That Contradicts False Testimony Given In Response To Cross-Examination

The determination of truth at trial is the fundamental objective of our legal system, but it is not the only one. Exceptions must sometimes be made from the goal of pursuing the truth in order to give effect to other values deemed even more important. A prominent example of such an exception is the exclusionary rule, which prohibits the use of probative evidence that would otherwise aid in the truth-finding process because the evidence was obtained unlawfully. Because of its adverse impact on the ascertainment of truth, the rule has been described as "a needed, but grudgingly taken, medicament; no more should be

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Harris, since statements obtained without *Miranda* warnings may be untrustworthy to some degree, depending on the circumstances. *United States* v. *Whitson*, *supra*, 587 F. 2d at 951 n.5; see *Miranda* v. *Arizona*, 384 U.S. 436, 470 (1966).

swallowed than is needed to combat the disease." Amsterdam, *Search, Seizure and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378, 389 (1964). Accordingly, the Court has established that "the application of the rule [is] restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974).

The Court has made it clear that the principal purpose of the exclusionary rule, at least in the context of violations of the Fourth Amendment, is to deter official misconduct. See, *e.g.*, *Stone* v. *Powell*, 428 U.S. 465, 486 (1976); *United States* v. *Peltier*, 422 U.S. 531, 536-539 (1975); *United States* v. *Calandra*, *supra*, 414 U.S. at 347. The rule is not designed to remedy the particular violation of the defendant's rights that triggers its application or to make him whole for the improper breach of his privacy. *Stone* v. *Powell*, *supra*, 428 U.S. at 486; *Linkletter* v. *Walker*, 381 U.S. 618, 637 (1965); *Elkins* v. *United States*, 364 U.S. 206, 217 (1960). At times, the Court has also justified the rule on the basis of principles of "judicial integrity." See, *e.g.*, *Terry* v. *Ohio*, 392 U.S. 1, 12-13 (1968). The Court has explained, however, that in the Fourth Amendment area, where the trustworthiness of the evidence is not in question, the policy of judicial integrity "has limited force" (*Stone* v. *Powell*, *supra*, 428 U.S. at 485), amounting in essence to the goal that the court not unduly encourage violations of Fourth Amendment rights by their rulings. Accordingly, the inquiry is "essentially

the same as the inquiry into whether exclusion would serve a deterrent purpose." *United States* v. *Janis*, 428 U.S. 433, 459 n.35 (1976). See also *United States* v. *Peltier*, *supra*, 422 U.S. at 536-539.

Utilizing this analysis, the Court has declined to apply the exclusionary rule in a variety of contexts in which the deterrent effect of exclusion on police conduct is judged unlikely to outweigh the cost to society that would result from excluding the evidence. For example, in *United States* v. *Calandra*, *supra*, the Court declined to prohibit the government from asking a grand jury witness questions based on information obtained in an illegal search. The Court observed that such an "extension of the exclusionary rule would seriously impede the grand jury" and stated that "[a]ny incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best." 414 U.S. at 349, 351. Likewise, in *United States* v. *Janis*, *supra*, the Court held the exclusionary rule inapplicable to bar evidence illegally seized by a state officer from admission in a federal civil tax proceeding, reasoning that "the additional marginal deterrence provided by forbidding a different sovereign from using the evidence in a civil proceeding surely does not outweigh the cost to society of extending the rule to that situation." 428 U.S. at 453-454. And in *United States* v. *Ceccolini*, 435 U.S. 268 (1978), the Court held that the exclusionary rule should often be relaxed in the context of the testimony of a live witness who was identified as being in possession of relevant information as a result of an illegal search. The Court reasoned that applying the exclusionary rule to disqualify a knowledgeable witness from testifying at trial would impose " 'serious obstructions to the ascertainment of truth,' " while applying the rule in the context of that case "could not have the slightest deterrent effect on the behavior" of police officers. 435 U.S. at 277, 280.

In each of the foregoing cases, the Court recognized the dispositive factor to be the degree of additional deterrence that suppression could be expected to provide in the particular circumstances.[12] In each case, the Court concluded that, in view of the fact that the exclusionary rule already required suppression for some important prosecutorial needs, suppression in the circumstances presented, on the basis of the same police conduct, would not provide sufficient additional deterrence to outweigh the substantial societal costs of exclusion.

Those principles are equally applicable to this case. The question here is whether the application of the exclusionary rule to prevent impeachment of cross-examination testimony will provide sufficient addi-

[12] A similar analysis underlies decisions barring invocation of the exclusionary rule in federal collateral attacks on state convictions (*Stone* v. *Powell*, *supra*), declining to apply the exclusionary rule retroactively (see, *e.g.*, *United States* v. *Peltier*, 422 U.S. 531, 536-539 (1975); *Desist* v. *United States*, 394 U.S. 244, 254 n.24 (1969)), and denying "standing" to persons whose own Fourth Amendment rights are not violated by an unconstitutional search (see, *e.g.*, *Rakas* v. *Illinois*, 439 U.S. 128, 134 (1978); *Brown* v. *United States*, 411 U.S. 223, 229 (1973); *Alderman* v. *United States*, 394 U.S. 165, 174-175 (1969)).

tional deterrence of police misconduct to outweigh the harm in allowing false testimony to go unchallenged. We believe it is entirely implausible to suppose that the rule for which we contend would, to any material extent, encourage law enforcement officers to conduct illegal searches or seizures.

The paramount disincentive to such action is the expectation that, by operation of the exclusionary rule, illegally obtained evidence will be excluded from the prosecution's case in chief. In many cases, this exclusion would destroy the prosecution's case at the outset, because without the suppressed evidence the prosecution would not have sufficient evidence to get to the jury.[13] Even if the prosecution did have sufficient evidence to go to trial, several circumstances would have to coincide at trial in order for the rule we propose to be implicated. If the defendant elects not to testify or if he testifies truthfully, as he is obligated to do, the evidence could not be introduced for impeachment. If the defendant's direct testimony is limited to topics that do not justify cross-examination relating to the suppressed evidence, the evidence could not be introduced. Finally, if the defendant's direct testimony itself were in conflict with

[13] This was the case, for example, with the illegally seized evidence that was ultimately introduced for impeachment purposes in *Walder*. The prosecution in connection with which the evidence had been seized was dropped, apparently for lack of evidence, shortly after the evidence was suppressed. 347 U.S. at 63. The question of admitting the evidence for impeachment arose only when the defendant was charged two years later with a different offense.

inferences to be drawn from the suppressed evidence, the evidence could be introduced for impeachment under *Harris* and *Walder*, regardless of the disposition of the instant case.

It is highly speculative, to say the least, to suppose that an officer who would otherwise be deterred by the prospect of exclusion from the prosecution's case in chief would nevertheless be moved to make an illegal search for evidence by the possible availability of such evidence to impeach testimony given by the defendant on cross-examination. Indeed, if some overzealous officer did contemplate the practical consequences of his actions, he would undoubtedly conclude that the disadvantage of making certain evidence unavailable for the prosecution's case in chief far outweighed any "speculative possibility" (see *Oregon* v. *Hass*, *supra*, 420 U.S. at 723) that the evidence could be used for impeachment if the defendant were to testify falsely on cross-examination.[14]

[14] In this case, of course, there is no suggestion that the officers' conduct involved a deliberate or calculated Fourth Amendment violation. The agents searched respondent's luggage within a few hours after he entered the country and before he left the airport. While we do not contend here that the officers' action was lawful, we believe that it could be justified as a proper border search and that it was not unreasonable for the officers to believe that they were acting lawfully. See note 1, *supra*. When police officers act in good faith, application of the exclusionary rule generally serves little purpose and may be viewed by society as disproportionate to the wrong. See, *e.g.*, *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974).

Clearly, the exclusion of illegally seized evidence from use at trial in impeaching false testimony cannot be justified on the basis of its possible effect in deterring Fourth Amendment violations. The Court, of course, has already recognized this fact in finding in *Harris* and *Hass* that the "speculative possibility" of deterrence did not justify exclusion. Although both of those cases dealt with situations where the false testimony was given on direct examination, any incremental deterrence that would result from a rule forbidding the impeachment of false testimony on cross-examination would be insignificant, and cannot outweigh the interests of exposing false testimony by the defendant. The deterrence policy behind the exclusionary rule simply does not support a distinction in its application between false testimony on direct examination and on cross-examination. Indeed, *Harris* and *Hass* have already suggested how the balance between deterrence of Fourth Amendment violations and truth-seeking should be struck. "[S]ufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." *Harris, supra*, 401 U.S. at 225; *Hass, supra*, 420 U.S. at 722.

This statement from *Harris* plainly reflects the Court's conclusion that, with few exceptions, illegal searches and seizures that are deterrable at all by the prospect of evidentiary exclusion will be successfully deterred by the knowledge that the prosecution will have to make out a prima facie case without resort to illegally seized evidence. We believe that

this conclusion is sound. Few indeed will be the occasions on which police officers are both so sophisticated and so calculating that they will undertake an illegal search because of possible trial uses of evidence other than in the prosecution's direct case. The implication of this principle is that, if the prosecution survives a motion for judgment of acquittal at the close of its case, and the defense then elects to adduce testimony that is belied by the illegally seized evidence, such evidence should become admissible on rebuttal for all purposes, not just for impeachment.

While we believe that is a proper result, the Court need not go so far in deciding the present case. Here, the evidence was admitted only for the limited purpose of impeaching respondent's credibility, not as substantive evidence. Moreover, here the deterrence benefits of exclusion, such as they may be, must be weighed against particularly strong interests in safeguarding meaningful cross-examination and protecting the integrity of the judicial process against the taint of false testimony. Were this Court to sustain the distinction between direct and cross-examination drawn by the court of appeals, defendants would be relatively free on direct examination to testify falsely and to convey misleading impressions about their actions and intentions—provided they took care to tailor their testimony to avoid statements squarely contradicted by the illegally seized evidence—without fear of effective challenge on cross-examination. This constitutes a use of the exclusionary rule as an instrument to thwart the "traditional truth-testing de-

vices of the adversary process," *Harris*, *supra*, 401 U.S. at 225, and can only encourage the commission of perjury.

We submit that the defendant should not be permitted to turn the exclusionary rule to his benefit in this manner. When he takes the stand, the defendant is obligated to respond to proper cross-examination questions, *McGautha* v. *California*, *supra*, and he is obligated to testify truthfully, *United States* v. *Grayson*, *supra*. If he chooses to commit perjury, the Fourth Amendment cannot protect him against impeachment of his credibility. Accordingly, false testimony given in response to proper cross-examination questions within the scope of the direct testimony must not be permitted to stand without impeachment, even if the impeaching evidence was illegally seized.[15]

In our view, this position is consistent with the holding of *Agnello*, which rejected impeachment by

[15] In this case, the line of cross-examination of respondent concerning the T-shirt was suggested by McLeroth's testimony that respondent assisted him in preparing the T-shirt. Although not presented here, a situation could arise in which the line of cross-examination that results in the false testimony was suggested only by the tainted evidence, *i.e.*, the cross-examination is a "fruit" of the illegal seizure. In that situation, the need for admission of the evidence is arguably not as strong as it is here, because exclusion would not effectively foreclose the prosecution from pursuing legitimate lines of cross-examination that would have been pursued even without the illegal seizure. The Court in *Agnello* appears to have relied heavily, if not exclusively, on this factor of the impropriety of the cross-examination, either because it exceeded the scope of the direct examination or because it was a

tainted evidence in a case in which the cross-examination was deemed to have improperly gone beyond the scope of the direct examination. To the extent that *Agnello* must be read to prohibit the use of tainted evidence for impeachment when the cross-examination is proper, we submit that it should be overruled.

II. THE EVIDENCE SUPPRESSED IN THIS CASE WAS ADMISSIBLE TO IMPEACH RESPONDENT'S DIRECT TESTIMONY

We have argued in Part I, *supra*, that the court of appeals was incorrect in its holding that illegally seized evidence is admissible to impeach false testimony only if that testimony occurs on direct examination. Instead, we have contended the evidence was admissible here to impeach respondent's testimony, which was patently false and contradicted by the evidence, given in response to proper cross-examination questions. Even assuming that this Court adopts the distinction drawn by the court of appeals between testimony on direct examination and cross-examination, however, we submit that the evidence in this case was admissible because it in fact sufficiently contradicted respondent's direct testimony.

fruit of the illegal seizure. See 269 U.S. at 35; note 7, *supra*.

We would submit, however, that even in the situation where the cross-examination is a fruit, the policy of ascertaining the truth would outweigh the minimal additional deterrence to be gained by excluding such questions. Excluding evidence from use in the case in chief, and thus in many cases preventing a case from going to trial, is a sufficient deterrent to unlawful police conduct.

The test applied by the court of appeals is that "the evidence in question must contradict a particular statement made by the defendant" on direct examination (Pet. App. 7a). Because respondent did not testify specifically about the incriminating T-shirt on direct examination, the court of appeals held that the case was controlled by *Agnello* and that the evidence could not be introduced for impeachment.[16] In applying this test, however, the court of appeals allowed respondent, by virtue of his careful choice of words, to suggest to the jury that he had no involvement with the T-shirt, while at the same time insulating himself from impeachment. Indeed, respondent's testimony illustrates how easy it will be in many cases for defendants to tailor their direct testimony to avoid specific mention of the suppressed evidence, and thereby impeachment, while effectively denying the inferences to be drawn from the evidence.

McLeroth testified that he smuggled cocaine into the United States, after his and respondent's first trip to Peru, in bags strapped to his body by an elastic bandage that was wrapped around him and taped at the ends. Respondent assisted in securing the bags to McLeroth's body (A. 18). McLeroth also testified that the cocaine smuggled in on the fourth

[16] The court also relied on the fact that respondent was not "asked about the contents of his luggage" (Pet. App. 9a). This is not strictly true; respondent was asked on direct examination whether he had any cocaine in his luggage (A. 34). His denial that he had any cocaine, however, was truthful and provides no grounds for introduction of the suppressed evidence for impeachment.

trip, which resulted in respondent's arrest, was secreted in the altered T-shirt with pockets and that respondent aided in hiding the cocaine in the T-shirt (A. 27-28) and also originally supplied McLeroth with a pocketed T-shirt (A. 21). On his direct examination, respondent testified as follows (A. 34):

> Q. And you heard Mr. McLeroth testify earlier as to something to the effect that this material was taped or draped around his body and so on, you heard that testimony?
>
> A. Yes, I did.
>
> Q. Did you ever engage in that kind of activity with Mr. McLeroth and Augusto or Mr. McLeroth and anyone else on that fourth visit to Lima, Peru?
>
> A. I did not.

Although respondent did not specifically deny participation in the preparation of the T-shirt for smuggling, his denial that he engaged in "that kind of activity" on the fourth visit to Peru could only have been taken by the jury to be a denial of his participation in the concealment of the cocaine. Considered in the abstract, the phrase "that kind of activity" is a vague one: it could be interpreted broadly to refer to the process of concealing material before smuggling it, in which case the suppressed evidence would contradict respondent's testimony; or it could, theoretically at least, refer only to "tap[ing] or drap[ing]" material around McLeroth's body, in which case the evidence would not necessarily be in conflict with respondent's testimony, because the preparation

of the T-shirt arguably did not entail "draping" material around McLeroth's body. Therefore, it cannot be said that respondent's direct testimony was unambiguously contradicted by the suppressed evidence.

Viewed in context, however, there can be no doubt that the thrust of respondent's direct testimony was to give the jury the false impression that he did not engage in concealing the cocaine for the smuggling attempt. Indeed, testifying only to the narrow point of whether respondent engaged in "taping or draping" on the fourth trip would have served no purpose, because neither McLeroth nor the government ever contended that the method of taping bags to the body was used on the fourth trip. Consequently, respondent's counsel deliberately did not ask him whether he was involved in taping on the fourth trip, but rather whether he was engaged in "that kind of activity." The jury could only take this to mean the concealment activity that the government actually contended was engaged in on the fourth trip. Respondent's general denial therefore had the same impact on the jury as if he had explicitly denied involvement with the T-shirt, but it was carefully tailored to avoid reference to the T-shirt.[17]

Despite the damaging false impression given by respondent's testimony, the court of appeals refused

[17] It is clear that respondent was consciously avoiding reference to the T-shirt. When asked on cross-examination whether he had denied involvement in "the wrapping of any bandages or tee shirts or anything involving Mr. McLeroth," respondent replied: "I don't—I said I had nothing to do with any wrapping or bandages or anything, yes" (A. 35).

to permit impeachment on the ground that no "particular statement made by the defendant" was contradicted (Pet. App. 7a, 9a).[18] Application of this standard would result in a situation where the threat of impeachment would have little effect in inhibiting a defendant from testifying falsely on direct examination; rather, it would usually preclude exposure to the jury of the falsity of the direct testimony. By giving careful consideration to the phrasing of their testimony, "defendants would be able to frustrate the truth-seeking function of a trial by presenting tailored defenses insulated from effective challenge." *Doyle* v. *Ohio*, *supra*, 426 U.S. at 617 n.7.

Cases decided by other courts of appeals disapproving impeachment of false testimony given on cross-examination have not involved such extensive direct testimony,[19] and it is questionable whether those

[18] The court went on to imply that it might be necessary to testify specifically about the suppressed evidence in order to meet this standard of contradiction (Pet. App. 7a, 9a), a position that respondent apparently takes (see Br. in Opp. 4, 6). This approach is so narrow as to almost eliminate the possibility of impeachment in any case, as illustrated by the defendant's argument in *United States* v. *Tweed*, 503 F.2d 1127, 1130 (7th Cir. 1974), that evidence that certain chemicals found in dynamite were detected on his clothes could not be admitted for impeachment because he did not testify about those chemicals on direct, only about whether he possessed dynamite.

[19] In *United States* v. *Hickey*, 596 F.2d 1082 (1st Cir. 1979), the suppressed evidence was a statement by the defendant that he was known as "Booboo." At the close of the government's case, the trial court issued an advance ruling that if the defendant took the stand he could be asked on

courts would have excluded the impeachment evidence offered in this case. In *United States* v. *Whitson*, 587 F.2d 948 (9th Cir. 1978), the defendant was indicted for possession of an unregistered destructive device and for destruction of a vehicle used in interstate commerce after his van was blown up. The suppressed evidence was a statement by the defendant that he had been "in ordnance" in the Army. On his direct examination he denied having destroyed the vehicle or having possessed a bomb for that purpose. On cross-examination the government asked him whether he had told the officer that he was in the ordnance branch of the army. Following the defendant's negative response to these questions, the government introduced the suppressed evidence. While the defendant's knowledge of explosives was an area that could legitimately be explored on cross-examination (587 F.2d at 951), he had not adverted to any lack of knowledge on direct examination. Accordingly, the court reversed, concluding that the weight of authority was that tainted evidence could not be used to impeach "on a matter not opened by the defendant" (587 F.2d at 952).

In *United States* v. *Mariani*, 539 F.2d 915 (2d Cir. 1976), the defendant, charged with bank robbery, denied on direct examination that he had planned or

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cross-examination about nicknames, and that if he denied having been known as "Booboo," the government could introduce his prior statement for impeachment purposes. The defendant then declined to take the stand, and the court of appeals reversed the conviction. In view of the advance ruling posture of the case, the First Circuit had no occasion to consider the actual scope of the defendant's direct testimony.

discussed the robbery with his co-defendant and also stated that he would not rob a bank. Some bullets had been found in a search of the defendant's car that was assumed to be unlawful. After eliciting a denial from the defendant on cross-examination that the bullets were found in the car, the prosecution introduced the bullets for impeachment purposes. Focusing on the scope of defendant's direct examination, the court of appeals reversed on the ground that "the connection between Mariani's statement that he wouldn't rob a bank and the fact that bullets were found in his car is far too tenuous." 539 F.2d at 924. Finally, in *United States* v. *Trejo*, 501 F.2d 138 (9th Cir. 1974), the defendant on direct examination denied any participation in the armed bank robbery with which he was charged, and he offered an alibi. On cross-examination, he denied that he had ever owned a pistol, and the prosecution introduced for impeachment a pistol found in his home during an illegal search. The court affirmed the conviction but noted in dictum that it was error to permit the gun to be introduced "since the offered evidence does not focus on the truthfulness of a defendant's direct testimony." 501 F.2d at 145. Thus, the court of appeals' reliance in this case on *Mariani* and *Trejo* to support its requirement that a particular statement of the defendant be contradicted before illegally seized evidence is admissible for impeachment seems misplaced. That requirement is far more restrictive than anything suggested by those decisions.

Certainly, nothing in *Agnello* or *Walder* supports the narrow view taken by the court of appeals of the scope of impeachable testimony. In *Agnello*, the de-

fendant's direct testimony neither stated nor implied anything that was inconsistent with the suppressed evidence. In *Walder*, the suppressed heroin capsule was admitted even though it was not mentioned in the defendant's direct testimony. Surely, the prohibition in *Walder* against "letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility" (347 U.S. at 65) was not meant to be limited solely to cases where the suppressed evidence squarely contradicts a particular statement made on the defendant's direct testimony. This prohibition will be of no practical significance if respondent's carefully tailored direct testimony in this case is held to be insulated from impeachment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-305

UNITED STATES OF AMERICA,

Petitioner,

vs.

J. LEE HAVENS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT.

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OPINION BELOW.

The opinion of the Court of Appeals for the Fifth Circuit, reversing respondent's conviction at trial and remanding the case to the United States District Court for the Southern District of Florida for a new trial is reported at 592 F. 2d 848.

QUESTION PRESENTED.

The government incorrectly presents the question which is before this Court. Therefore, respondent submits the following as an accurate statement of the question presented:

> Whether evidence suppressed as the fruit of an unlawful search and seizure may nevertheless be introduced into evidence in an attempt to impeach a defendant's cross-examination testimony at trial, where the evidence does not contradict the defendant's testimony on direct examination.

STATEMENT OF THE CASE.

The Statement presented by the government in its brief does not fully state the relevant facts, and it therefore requires amplification.

I. Summary of the Facts.

Following a jury trial in the United States District Court for the Southern District of Florida, respondent was convicted of possessing cocaine with intent to distribute it and of importing and conspiring to import cocaine, in violation of 21 U. S. C. 841(a)(1), 952(a), 960(a)(1), and 963. He was sentenced to three concurrent eight year terms of imprisonment, to be followed by a special parole term of three years, and to a fine of $5,000.00.

Government witness John Kenneth McLeroth, an unemployed attorney,[1] testified that he had personally smuggled cocaine into the United States because he had been asked to do so by respondent. He was essentially the sole witness against respondent, who, for reasons not established by the government, was traveling with the smuggler he had allegedly hired.

McLeroth,[2] who had made numerous trips to South America over a period of the past several years (R. 68), made three trips to Peru in the company of respondent during 1977: once in April and twice in September (R. 82-117).

---

1. McLeroth testified that he had filed no income tax return for several years because he had no income (R. 193).

2. McLeroth was originally a co-defendant in this case. Prior to trial McLeroth agreed to testify for the government against respondent. In return for his testimony, McLeroth, who was charged with the same offenses as respondent, had two counts against him dismissed on motion of the government, and he received a sentence of five years' probation for importation of cocaine.

McLeroth testified that on the April trip,[3] with respondent's help, he had smuggled a substantial quantity of cocaine into the United States. He said that the cocaine was placed about his body and that respondent had helped wrap his body with ace bandages and tape to hold the cocaine securely in place (A. 18).

McLeroth then testified that an improved technique was developed for subsequent trips whereby a pocketed shirt was to be used, and the wrapping of his body with tape and bandages was to be abandoned (A. 20-21).

He testified that prior to his first trip in September, respondent had met with him in Fort Wayne, Indiana, and had given him a T-shirt with pockets sewn on it for the purpose of smuggling cocaine (A. 20-21). McLeroth further said that he wore the T-shirt to Peru on that first trip early in September. He said that no cocaine was available in Peru then, necessitating a second trip, later in the month (A. 21-22). At the conclusion of the second September trip McLeroth was arrested, on October 2, 1977, wearing the pocketed T-shirt filled with thirteen packages of cocaine (A. 28). On that date he and respondent arrived at Miami International Airport on a flight from Lima, Peru. Respondent cleared customs and left the customs area. McLeroth was searched, and the cocaine was discovered. After initially indicating to authorities that he had been acting alone in the smuggling venture, McLeroth subsequently made a statement implicating respondent (R. 135).[4]

Respondent had proceeded to the domestic portion of the air terminal and booked passage home to Indiana, later in the afternoon. He checked his luggage with United Air Lines.

As respondent was about to board his flight to Indiana several hours later, he was arrested. His luggage was seized, without a

3. The trip in April, 1977 was respondent's first trip to South America (R. 346).

4. Respondent maintained both at his arrest (R. 54-55) and at trial that he was engaged as a legitimate businessman seeking to establish a business exporting goods to Peru (R. 344-356).

warrant, from the domestic airline. Prior to trial the court held the seizure and subsequent search of respondent's luggage to be in violation of his rights under the Fourth Amendment to the United States Constitution, and the contents of his luggage were ordered suppressed as evidence (Motion to Suppress Hearing, January 18, 1978).[5]

The suppressed contents of respondent's luggage contained no controlled substance of any kind, but did include, according to government DEA agents, two T-shirts which were not respondent's size. They had been cut up in a manner suggesting that the cut away portions had been used to fabricate the pockets for the smuggling shirt McLeroth had taken with him to South America early in September and which he was wearing, returning from a later trip (on October 2, 1977) filled with cocaine (A. 36-38). The government advanced no theory to explain why respondent was traveling with these scraps, or more importantly, why respondent was returning from South America with remnants of a shirt manufacturing process which it alleged was completed weeks earlier in Indiana, *prior to a previous trip* (p. 4, *supra*).

5. The government's gratuitous assertion in its brief at page 3, footnote 1, to wit: that the suppression order was not appealed because it was felt that there was sufficient evidence to convict without the suppressed evidence deserves a response. The government's sole witness to the matters upon which the indictment was based was Mr. McLeroth, who can most charitably be described as unreliable. He was an admitted frequent traveler to South America before ever traveling there with respondent. While he testified that he had so little income for the prior several years that he had not been required to file any tax returns, defendant's exhibits showed that he had run over a quarter of a million dollars through his personal checking account in the years 1974-5-6 (D. Ex. 1; R. 417), and that his telephone bills were frequently thousands of dollars per month (D. Ex. 2; R. 185). Further, the assertion is ironic in light of the lengths to which the government has gone to use the illegal evidence. The suppression ruling was, in fact, fully supported by existing law. See respondent's (defendant's) memorandum on the matter filed prior to the suppression hearing of January 18, 1978.

II. Trial Testimony.

At trial, respondent testified in his defense and denied guilt on both direct examination and cross-examination.

A. *Direct examination.* A portion of respondent's direct examination testimony which is relevant to the issues raised by the government follows (A. 34):

> Q. And you heard Mr. McLeroth testify earlier as to something to the effect that this material was taped or draped around his body and so on, you heard that testimony?
>
> A. Yes, I did.
>
> Q. Did you ever engage in that kind of activity with Mr. McLeroth and Augusto or Mr. McLeroth and anyone else on that fourth visit to Lima, Peru?
>
> A. I did not.
>
> Q. Now, this is the fourth visit to Peru, on the return, was the time that Mr. McLeroth was stopped and arrested for the possession and so forth, of cocaine.
>
> I will ask you first whether or not you knew that he, McLeroth, was bringing cocaine back into the United States from Lima, Peru.
>
> A. No. I did not.
>
> Q. Now, when you returned from Lima, Peru, into the United States, did you come into the Miami International Airport?
>
> A. Yes, I did.
>
> Q. And I will ask you whether or not you proceeded through Customs. You.
>
> A. Yes, I did.
>
> Q. I will ask you whether or not you were arrested with cocaine on your body or luggage or anywhere else.
>
> A. No, I was not.

B. *Cross-examination.* A portion of respondent's cross-examination testimony which is relevant to the issues raised by the government follows[6] (A. 34-35, 46-48):

6. All of the following cross-examination interrogation of respondent by the government was in the presence of the jury.

> Q. Take your time and examine that, sir.
>
> A. All right.
>
> Q. What size is that shirt?
>
> A. A 38-40.
>
> Q. What size do you wear, sir?
>
> A. A 46. 44, sometimes, 46, sometimes.
>
> Q. This would not be your shirt?
>
> A. No, it would not.
>
> Q. Now, on direct examination, sir, you testified that on the foutrh trip you had absolutely nothing to do with the wrapping of any bandages or tee shirts or anything involving Mr. McLeroth; is that correct?[7]
>
> A. I don't—I said I had nothing to do with any wrapping or bandages or anything, yes. I had nothing to do with anything with McLeroth in connection with this cocaine matter.

At this point the jury was excused, the respondent was sent from the courtroom by the trial judge, and a lengthy discussion ensued between the trial judge, prosecutor, and defense counsel over the latter's objection to the line of questioning that the prosecution was pursuing (A. 36-45).

The jury then returned and the cross-examination continued (A. 46):

> Q. Mr. Havens, calling your attention to the testimony earlier when I was on cross-examination, you said that you wear a Size 44-46 tee shirt. Is that correct?
>
> A. Yes. That would fit me.
>
> Q. But you don't wear a Size 38 to 40 tee shirt?
>
> A. No. Not for many years.
>
> Q. On October 2, you flew from Peru into the Miami International Airport, is that correct?
>
> A. Yes, I did.
>
> Q. And you took your baggage and cleared Customs; is that correct?

7. The question by the prosecution on cross-examination was the first time that any reference had been made during respondent's testimony to T-shirts.

A. Yes.

Q. On that day, sir, did you have in your luggage a Size 38-40 medium man's tee shirt with swatches of clothing missing from the tail of that tee shirt?

A. Not to my knowledge.

Mr. Culverhouse: Can I have an Identification tag put on this?

The Court: Consider it as Government's 9 for Identification. And show it to the witness.

By Mr. Culverhouse:

Q. Mr. Havens, I'm going to hand you what is Government's Exhibit 9 for Identification and ask you if this tee shirt was in your luggage on October 2nd, 1975.

A. Not to my knowledge. No.

Q. Sir, on October 3, 1977, you were leaving Miami, Florida, to return to Ft. Wayne, Indiana. Is that correct? correct?

A. That's correct.

Q. And, at that time, did you pick up your luggage from Agent Martinez of the Drug Enforcement Administration?

A. Yes, I did.

Q. And, at that time, did you tell Agent Martinez that that tee shirt that was found in your luggage did not belong to you, but belonged to John McLeroth?

A. No, I did not say those words. No.

Q. What words did you say?

A. I said that—they showed me a tee shirt when I went up to pick up my luggage, and this may well have been the tee shirt that they showed me, I don't know, they said:

"What size shirt do you wear?"

And I said, "I wear," I think I said, "a 46, usually."

But I don't wear—I don't wear this type of shirt. My shirts—my undershirts are the single straps over the—and—so, I said;

"I"—they asked me, I believe, if Mr. McLeroth wore this size shirt.

And I said, "He probably does. He is somewhat smaller than I."

But I said, "I definitely don't wear this size shirt."

They held this one up and they held another one, I think, or one that looked like this, and another one, and to my knowledge, that was the first time that I had seen those shirts, and I don't know whose they were or whose they are. I know they're not mine. I know I didn't put them in my suitcase.

And, I know I didn't see them in my suitcase.

I only saw these—well, I'll take it back.

The agent the next—the day I took my luggage, the agent brought in my suitcase.

And he said, "Let me give you a receipt for this."

"For your suitcase back."

And I says, "I don't need a receipt. I just want to get out of here." I had spent the night in jail.

And he said, "No, no, let's look through it."

So, he reached in the suitcase and pulled this out. And this was the first time that I had seen the shirt.

He said, "Is this yours?"

And we went through that conversation that I just related.

* * * * *

Q. And that tee shirt is Size 38-40 in that bag?

A. Yes. Medium, 38-40.

Q. And it's like Exhibit No.—

A. I couldn't say. Yes, the label appears to be identical.

Q. Sir, is it your testimony that on October 2, 1977, when you came through Customs that this was not in your suitcase?

A. No. I never saw these items in my suitcase until an agent pulled them out of the bag on October 3rd; the day afterwards when I went to pick them up.

I'm not saying they weren't in my suitcase. I don't know that. I know that if they are in my suitcase I had no knowledge of them being there.

Q. Did you pack your suitcase?
A. Yes, I did.
Q. In Peru.
A. Yes.
Q. Sir, are you suggesting that the agents of the Drug Enforcement Administration placed this in your suitcase?
A. I am not suggesting anything. I am just testifying to what I know.

C. *Rebuttal.* On rebuttal the government called the DEA agent from whom respondent had received his luggage on the day following his arrest (October 3). The agent testified that respondent had been made aware that the T-shirts which were suppressed as evidence were in his luggage on October 2, not on October 3. Agent Martinez never disputed respondent's testimony regarding the display of the shirts on October 3 or the conversation relating to the "discovery" of the shirts at that time (A. 50-52).

SUMMARY OF ARGUMENT.

The Court of Appeals for the Fifth Circuit reversed respondent's conviction at trial because the trial court had erroneously permitted suppressed evidence to be admitted in evidence in an effort to "impeach" respondent's cross-examination testimony. Respondent had not testified about the suppressed evidence on direct examination, and the Court of Appeals held that *Agnello* v. *United States,* 269 U. S. 20 (1925) controlled.

I. The government contends that *Agnello* should be overruled because the Court has "abandoned the premise" of *Agnello* and further, that there should be no logical difference between impeachment of direct testimony and impeachment of cross-examination testimony. The first part of that contention is clearly not supported by a review of applicable cases, which either expressly or impliedly are consistent with *Agnello.* With respect to eliminating the distinction between using illegal evidence to impeach direct examination testimony and using it to impeach cross-examination testimony, the government has not considered that such action would result in a severe weakening of the protection granted society by the Fourth Amendment. The argument sets forth an analysis which demonstrates that danger, the principal area of concern being the greater incentives given certain groups to disregard the restrictions imposed by the Fourth Amendment.

The government argues that *Agnello* undermines the integrity of the judicial process by permitting perjury to go unchallenged. *Agnello* does nothing of the sort. Of course a defendant does not have the right to commit perjury, but it is when the government enters forbidden areas (made forbidden by its own illegal acts) on cross-examination that the possibility arises for false testimony which may not be impeached. Adequate restraints

against a defendant building a defense on false testimony through direct examination presently exist.

II. The government also contends that the Court of Appeals was in error in not finding that respondent's testimony on direct examination was sufficient to permit the use of the suppressed evidence to impeach that testimony. Respondent's testimony on direct examination did not deal in any manner with the suppressed evidence, and his direct testimony was well within his constitutional right to meet the charges made against him, without establishing any right in the government to use illegal evidence to impeach.

ARGUMENT.

I.

EVIDENCE WHICH HAS BEEN PROPERLY SUPPRESSED AS THE FRUIT OF AN UNLAWFUL SEARCH AND SEIZURE MAY NOT BE ADMITTED INTO EVIDENCE IN AN ATTEMPT TO IMPEACH A DEFENDANT'S CROSS-EXAMINATION TESTIMONY AT TRIAL, WHERE THE EVIDENCE DOES NOT CONTRADICT THE DEFENDANT'S TESTIMONY ON DIRECT EXAMINATION.

The government asserts that this Court:

> has never specifically considered the question whether illegally seized evidence is admissable to impeach testimony in response to cross-examination properly within the scope of defendant's direct examination. (Gov. Br. 8)

This assertion is inaccurate, and it reveals the failure of the government to understand *Agnello* v. *United States,* 269 U. S. 20 (1925) and its applicability to the present case.

The government misreads *Agnello* when it states:

> the Court held that certain illegally seized evidence could not be admitted to impeach the defendant's denial on cross-examination that he had ever seen that evidence. (Gov. Br. 8)

In *Agnello,* the defendant denied on cross-examination that he had *ever seen narcotics.* Then, by way of impeaching that statement, a can of illegally seized cocaine was produced by the prosecution and the defendant was interrogated about it. 269 U. S. at 29, 30. This was the impermissible act by the prosecution—the attempt to use the illegal evidence to contradict the defendant's cross-examination testimony that he had never seen narcotics. There was no holding that the general question

about narcotics was outside the scope of proper cross-examination. The holding was that producing the illegal evidence and asking the defendant about it was improper. A unanimous Court went on to say:

> In his direct examination, Agnello was not asked and did not testify concerning the can of cocaine. In cross-examination, in answer to a question permitted over his objection, he said he had never seen it. *He did nothing to waive his constitutional protection or to justify cross-examination in respect of the evidence claimed to have been obtained by the search.* 269 U. S. at 35 (emphasis added).

Thus, not only has the Court previously considered the question presented, it clearly treated cross-examination testimony in a different manner than direct examination testimony.

The government is also in error when it contends that subsequent decisions of this Court, notably *Walder* v. *United States,* 347 U. S. 62 (1954), *Harris* v. *New York,* 401 U. S. 222 (1971) and *Oregon* v. *Hass,* 420 U. S. 714 (1975) have "rejected the principal premise of *Agnello.*" (Gov. Br. 8).

The government defines the "principal premise" of *Agnello* to be that "illegally seized evidence shall not be used at all" (Gov. Br. 8). This sweeping generalization was made by the Court in *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 392 (1920). It was subsequently quoted in *Agnello* (therein doubtless lies the government's confusion), but it was not necessary to the Court's decision in *Agnello* and it most certainly was not the principal premise of that case.

The above quotation from *Agnello* confirms that it was the use of the illegal evidence on cross-examination that was objectionable, and the implication is quite clear that had the direct examination dealt with that evidence, the attempt at impeachment would have been proper.

In *Walder* v. *United States, supra,* the Court permitted the use of evidence (illegally obtained) to impeach the *direct testimony* of the defendant, and it specifically reconciled its holding with *Agnello, supra,* saying:

> The situation here involved is to be sharply contrasted with that presented by *Agnello* v. *United States.* There the government, after having failed in its efforts to introduce the tainted evidence in its case in chief, tried to smuggle it in on cross-examination by asking the accused the broad question, "Did you ever see narcotics before?" 347 U. S. at 66.

In *Harris* v. *New York, supra* the government was permitted to impeach the defendant's *direct testimony* by a prior, inconsistent statement which had not been obtained in conformity with *Miranda* v. *Arizona,* 384 U. S. 436 (1966). In *Harris* the illegally obtained statement clearly and beyond question gave lie to the defendant's direct testimony.

Oregon v. *Hass, supra,* was a case quite similar to *Harris,* where again the defendant's *direct testimony* was permitted to be impeached by a prior inconsistent statement that would not otherwise have been admissible. Again, the illegal evidence squarely contradicted the defendant's direct testimony.

Thus *Walder, Harris,* and *Hass* have set forth a policy modifying the general doctrine of the *Silverthorne* case, *supra,* which had prohibited all use of illegally seized evidence. As the Court stated in *Walder:*

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the Weeks doctrine would be a perversion of the Fourth Amendment. 347 U. S. at 65.

Therefore, as correctly perceived by the Court of Appeals, the holding of *Agnello* directly forbids the actions undertaken by the prosecutor in this case. Indeed, the cases subsequent to *Agnello*

affirm, either expressly, as in *Walder*, or impliedly, as in *Harris* and *Hass*, the continued vitality of the *Agnello* ruling.

The government, however, says:

> To the extent that Agnello must be read to prohibit the use of tainted evidence for impeachment when the cross-examination is proper,,[8] we submit that it should be overruled. (Gov. Br. 37).

Because Agnello is squarely in point, as the Court of Appeals determined and as the above discussion demonstrates, the government is simply asking that *Agnello* be overruled in its entirety.

Three grounds for overturning *Agnello* are advanced by the government.

A. For its first ground it alleges that the decisions of this Court do not establish a distinction between impeachment of direct examination testimony and impeachment of cross-examination testimony (Gov. Br. 13-21). As shown above, the holding in *Agnello* is obviously contrary to this assertion. Certainly the various Courts of Appeal have had little difficulty in perceiving this very clear difference. See, for example, *United States* v. *Trejo*, 501 F. 2d 138 (1974), *United States* v. *Mariani*, 539 F. 2d 915 (1976), *United States* v. *Whitson*, 587 F. 2d 948 (1978), *United States* v. *Hickey*, 596 F. 2d 1082 (1979).

B. For its second ground the government alleges that the rule adopted by the Court of Appeals in this case undermines the integrity of the judicial process by permitting perjury to go

8. The repeated use of the phrase "when the cross-examination is proper" by the government appears meaningless insofar as it applies to the issues here presented. As the government contends, wide scope is permitted for cross-examination. If the cross-examination is not relevant to the offense charged it does not take the Fourth Amendment to have the question stricken. If, however, it is relevant, it must be answered. The question of a "proper cross-examination question" and the use of illegal evidence to impeach cross-examination testimony are two distinctly separate issues.

unchallenged (Gov. Br. 21-28). Two points must be made in reply to this argument.

First, the decisions of this Court have established that a defendant cannot *build a defense* by testifying falsely on direct examination without fear of impeachment. See *Walder* v. *United States, supra, Harris* v. *New York, supra* and *Oregon* v. *Hass, supra.*

To extend this policy to cross-examination testimony, while it may be superficially appealing, would bring about a grave erosion of the safeguard of the Fourth Amendment. A discussion of policy implications is set forth in paragraph "C," below.

Second, while the government's brief is replete with references to the "perjury" of the respondent, a careful review of the Statement of the Case, *supra,* and of the full record of this case makes it quite plain that the truth or falsity of respondent's cross-examination testimony is not clearly established by the suppressed evidence. The government apparently feels that it is entitled to an assumption of perjury as a matter of law when testimony is offered at variance with the official government view. Indeed, the government's version of the facts surrounding the suppressed evidence was so extraordinary (see pp. 3-5, *supra*) and the government's chief witness against respondent was so discredited at trial (see footnote 5, *supra*), that any assumption of perjury is more appropriately placed on the government.

It is noted that the relevant exceptions to the exclusionary rule which were previously reviewed[9] involved impeachment of *direct examination testimony*, and further, in all cases the impeaching evidence clearly and without question established the falsity of that direct testimony. In this case the speculative nature of the suppressed evidence, for impeachment purposes, is apparent from the Statement of the Case, *supra.*

9. See discussion of *Walder* v. *United States, Harris* v. *New York* and *Oregon* v. *Hass, supra* at pp. 14-15.

In fact, the suppressed evidence was admitted into evidence in this case based upon the rebuttal testimony of DEA agent Martinez (A. 50-52). See the discussion between counsel and judge at pages 36-45 of Appendix.

Because respondent had offered no testimony on direct examination at trial concerning the suppressed, cut up T-shirts, the government attempted to create, solely through cross-examination, a conflict in testimony through which the introduction of the T-shirts could be justified on the ground of impeachment. Accordingly, the prosecutor handed the suppressed evidence to respondent, in the presence of the jury, and inquired if his luggage had contained the T-shirts on the day of respondent's arrest (October 2). Respondent testified that he had no knowledge of the T-shirts being in his luggage until the following day when the luggage contents were examined in his presence at DEA headquarters, and a receipt given for certain items (A. 47, 48). Agent Martinez then testified in rebuttal that he had made respondent aware of the suppressed evidence on October 2, not upon October 3 (A. 50, 51).

The trial judge thereupon permitted the suppressed evidence to be introduced in evidence to impeach respondent's alleged "lie" that he had not seen the shirts on the day of his arrest, but on the following day (Pl. Ex. 9, 10; R. 441).[10] The trial judge allowed the unrestricted use of the suppressed evidence in final argument to the jury, and the evidence was taken into the jury room during deliberation (A. 53, 54).

10. The trivial nature of the conflict in testimony is clear. Even the conflict is not all that certain. Observe the following testimony of respondent on cross-examination:

> Q. Sir, is it your testimony that on October 2, 1977, when you came through Customs that this was not in your suitcase?
>
> A. No. I never saw these items in my suitcase until an agent pulled them out of the bag on October 3rd; the day afterwards when I went to pick them up.
>
> I'm not saying they weren't in my suitcase. I don't know that. I know that if they are in my suitcase I had no knowledge of them being there. (A. 49)

If, in truth, the government had wished to contest respondent's statement about when he had seen the contents of his luggage, it would have been the DEA agent's *statement* at trial that would have put into issue the truthfulness of respondent's testimony, not the shirts themselves. The transparent device of the government is there for all to see. It was a deliberate attempt to smuggle in illegal evidence.

The trial judge allowed the prosecutor to do this in the apparent belief that it was permitted under recent decisions of the Supreme Court, namely *Harris* v. *New York, supra,* and *Oregon* v. *Hass, supra* (A. 40, 41).

C. The government's final ground for overturning *Agnello* v. *United States, supra* is that the general purposes and policies of the exclusionary rule do not require the exclusion for impeachment purposes of evidence that contradicts "false testimony"[11] given in response to cross-examination (A. 28-37).

In dealing with the use of evidence unconstitutionally seized, the Supreme Court stated, over sixty-five years ago, that the use of the seized evidence involved a denial of the constitutional rights of the accused. *Weeks* v. *United States,* 232 U. S. 383 (1914). The decision established the rule that, in a federal prosecution, the Fourth Amendment barred the use of evidence secured through an illegal search and seizure.

The rationale behind the exclusionary rule is stated by Justice Powell in *Stone* v. *Powell,* 428 U. S. 465 (1976) at 492, 493:

> Evidence obtained by police officers in violation of the Fourth Amendment is excluded at trial in the hope that the frequency of future violations will decrease. Despite the absence of supportive empirical evidence, we have assumed the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it. More importantly, over the long term, this demonstration that

11. Again, the "assumption of perjury" doctrine questioned at page 16, *supra.*

> our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement policies and the officers who implement them, to incorporate Fourth Amendment ideals into their value system.
>
> We adhere to the view that these considerations support the implementation of the exclusionary rule at trial.

It is understood that this Court is of the view that exceptions to the exclusionary rule will be made if the societal costs outweigh the policy considerations set forth by Justice Powell *Stone* v. *Powell, supra.*

However, adoption of the government's position in this case would severely limit the protection afforded the public by the Fourth Amendment.

Under the rule proposed by the government, a defendant could be intimidated into not taking the witness stand in his defense because police had obtained prejudicial evidence through unconstitutional means. The defendant would realize that no matter how he testified on direct examination, the suppressed evidence would be admitted, or in the alternative, he would be obliged to make damaging admissions.[12]

The Court of Appeals in the present case recognized this insidious danger when it stated:

> According to the view of the trial judge and the prosecutor, defendant could be asked on cross-examination a question, which answered affirmatively would admit the incriminating tendencies of the illegal evidence, and, answered negatively would allow the subsequent introduction of the illegal evidence for purposes of impeachment. (Pet. App. 8a)

12. It will require little imagination on the part of law enforcement officers (and others) to conclude that such a state of affairs makes all illegal evidence, however acquired, extremely valuable. Files could be opened on target persons and illegal evidence could be systematically gathered over extended periods in the secure knowledge that such evidence, collected unconstitutionally today, could be used tomorrow for purposes of impeachment or intimidation.

It is well known that if a defendant does not testify in his behalf, especially a defendant without a prior criminal record (as in the present case), his chances for acquittal are materially diminished.[13]

In the present case the issue is not a narrow evidentiary matter with little impact on society as a whole. It is an issue which involves every criminal trial where the Fourth Amendment is at issue, and it is submitted that the potential cost of accepting the government's position is far too high.

Of course a defendant does not have the right to commit perjury. The government has not demonstrated how the *Agnello* doctrine, as applied by the Court of Appeals in the present case, would facilitate perjury on the part of a defendant. It is when the government enters forbidden areas (made forbidden by its own illegal acts) on cross-examination that the possibility arises for false testimony which may not be impeached. *Agnello* should not be overruled.

II.

RESPONDENT'S DIRECT TESTIMONY IN THIS CASE PROVIDED NO BASIS FOR THE INTRODUCTION OF SUPPRESSED EVIDENCE FOR IMPEACHMENT PURPOSES.

In *Weeks* v. *United States, supra,* at 347 U. S. 65 the Court said:

> Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. *He must be free to deny all the elements of the case against him* without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief. (Emphasis added.)

13. Handbook on Criminal Procedure in the United States District Court (Federal Defenders Program of San Diego, Inc.) 218 (1967); Amsterdam, Segal & Miller, Trial Manual for the Defense of Criminal Cases (1967).

Respondent was charged, as was government witness McLeroth, with possessing cocaine with intent to distribute it and of importing cocaine, and of conspiring to import cocaine.

The government contends that the following direct examination testimony of respondent is relevant:

> Q. And you heard Mr. McLeroth testify earlier as to something to the effect that this material was taped or draped around his body and so on, you heard that testimony?
>
> A. Yes, I did.
>
> Q. Did you ever engage in that kind of activity with Mr. McLeroth and Augusto or Mr. McLeroth and anyone else on that fourth visit to Lima, Peru?
>
> A. I did not.
>
> * * * * *
>
> Q. I will ask you whether or not you were arrested with cocaine on your body or luggage or anywhere else.
>
> A. No, I was not (A. 34, quoted at Gov. Br. 5).

In no way does the above cited testimony make reference to the suppressed evidence. The taping and draping referred to was alleged by the government to have been the method used by McLeroth, with respondent's assistance, to smuggle cocaine some five months prior to their arrest. It allegedly occurred on the first trip to Peru, not the fourth, where the government charged that a pocketed T-shirt was used instead of taping and draping. The "activity" referred to in the direct interrogation of respondent was, simply put, the smuggling activity for which he was on trial, and he simply denied that he had been engaged in it. Respondent did not elaborate upon nor did he embellish his denial. He simply said, "I did not."

It is interesting to note that the government regards respondent's truthful testimony on cross-examination as sinister. In footnote 17 at page 40 of its brief the government says:

> It is clear that respondent was consciously avoiding reference to the T-shirt. When asked on cross-examination whether he had denied involvement in "the wrapping of any bandages or tee shirts or anything involving Mr. McLeroth," respondent replied: "I don't—I said I had nothing to do with any wrapping or bandages or anything, yes."

Respondent's denial on direct examination of having cocaine at the time he was arrested was just a denial of the charge of possession of cocaine with intent to distribute it.

The whole argument advanced by the government on this point was obviously an afterthought (note the basis for the introduction of the T-shirt at trial) and it was dealt with quite properly by the Court of Appeals.

ISSUES NOT RULED UPON IN THE COURT OF APPEALS.

Respondent strongly urges that this Court affirm the decision of the Court of Appeals in this case. Nevertheless, in the event that this Court should render a decision favorable to the government, attention is respectfully directed to certain issues, properly raised by respondent, which were not ruled upon by the Court of Appeals.

Misconduct of the Prosecution. The trial court committed prejudicial error by permitting the prosecution to:

a) Defy a court order and confer with the chief government witness (McLeroth) at a critical time during cross-examination of said witness.[14]

b) Mislead defense counsel by withdrawal of an agreement and waiver made in open court, depriving defendant of an opportunity to produce planned witnesses.

c) Use evidence restricted by the trial judge for rebuttal purposes as evidence of guilt during final argument.

Deprivation of Right to Counsel. The trial court violated respondent's right to counsel under the Sixth Amendment to

14. McLeroth had testified on direct examination that he had been in extreme poverty during the three years prior to his arrest, obviously suggesting to the jury that he was easy prey when respondent allegedly approached him to smuggle cocaine some seven months prior to his arrest (R. 72, 75-77). During cross-examination he was confronted with his personal checking account statements showing that he had run over a quarter of a million dollars through his personal account during 1974, 1975 and 1976, and that his personal telephone bills often totalled thousands of dollars per month (See p. 5, footnote 5, *supra*). At this point the trial court adjourned for the day, saying to witness McLeroth:

"The Court: You are on the witness stand, so you cannot talk overnight about your testimony with anyone." (R. 170)

(Footnote continued on next page.)

the United States Constitution when it banished respondent from the courtroom during the trial and refused to permit defense counsel to speak with or go to him. *Geders* v. *United States,* 425 U. S. 80 (1976).

The issue of the misconduct of the prosecution referred to above was fully briefed at pages 27 through 36 of respondent's (appellant's) brief in the Court of Appeals, and at pages 8 through 10 of his amended reply brief.

The issue of deprivation of right to counsel referred to above was fully briefed at pages 37 through 40 of respondent's (appellant's) brief in the Court of Appeals, and at pages 7 and 8 of his amended reply brief.

The Court of Appeals, however, in the obvious belief that its reversal of respondent's conviction made these issues moot, said,

"We do not treat his other contentions because they involve rulings on matters that are not likely to recur upon retrial of his case." (Pet. App. 2a, footnote 4).

In accordance with established practice of this Court, it is respectfully requested that, in the event of a decision herein adverse to respondent, this cause be returned to the Court of Appeals for the Fifth Circuit for consideration of those issues formerly considered moot.

(Footnote continued from preceding page.)

When defense counsel attempted to protest the defiance of that order by the prosecutor and McLeroth, the prosecutor explained to the Court that he had misunderstood the order and had not believed that it applied to him. (R. 189-190)

CONCLUSION.

The judgment of the Court of Appeals should be affirmed.

If the judgment of the Court of Appeals is reversed, this case should be returned to that Court for consideration of issues formerly considered moot (pp. 24-25, *supra*).

Respectfully submitted,

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February, 1980.

FOR ARGUMENT

Supreme Court, U.S.
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No. 79-305

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

J. LEE HAVENS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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REPLY BRIEF FOR THE UNITED STATES

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1. Respondent asserts (Br. 18-19) that the government engaged in cross-examination solely for the purpose of creating a "trivial" conflict (Br. 18 n.10) in respondent's testimony regarding the date of his conversation with DEA Agent Martinez, in order to "smuggle in" illegally seized evidence. This confuses and misdescribes the basis for the cross-examination and subsequent impeachment. The illegally seized evidence was introduced to impeach apparent serious inaccuracies in respondent's testimony given in response to legitimate cross-examination by the government.[1]

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[1]When we speak of cross-examination as being legitimate or proper, we are of course laying to one side the question to be decided in this case—whether the cross-examination (or subsequent impeachment of answers given in response thereto) is impermissible on

McLeroth testified that he had smuggled cocaine into the United States on the first trip he made with respondent to Peru by taping bags of cocaine to his body with an elastic bandage (A. 18). He further testified that respondent had sewed bags of cocaine into the altered T-shirt that he used to smuggle cocaine when he was arrested on the fourth trip (A. 27-28). After a question referring to McLeroth's testimony concerning taping or draping of cocaine around his body, respondent testified on direct examination that he did not "engage in that kind of activity with Mr. McLeroth * * * on that fourth visit to Lima, Peru" (A. 34). This testimony suggested a denial of McLeroth's testimony that respondent assisted him in secreting the cocaine in the T-shirt. Naturally, and quite properly, the government sought to explore on cross-examination whether respondent's testimony was inconsistent with McLeroth's. In response to cross-examination concerning the wrapping of bandages or T-shirts around McLeroth, respondent replied (A. 35): "I had nothing to do with anything with McLeroth in connection with this cocaine matter." The questioning later continued as follows (A. 35):

> Q. And your testimony is that you had nothing to do with the sewing of the cotton swatches to make pockets on that tee shirt?
>
> A. Absolutely not.

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account of its relationship to illegally seized evidence. Respondent apparently recognizes (Br. 16 n.8) that, apart from the fact that the T-shirts were improperly seized, there was nothing irregular or improper about the line of cross-examination pursued by the prosecutor.

These explicit denials by respondent of any participation in the preparation of the altered T-shirt for smuggling were clearly inconsistent with the likely implication of the evidence that the cut-up T-shirt used to manufacture the pockets was found in respondent's luggage. Accordingly, the government asked respondent whether such a T-shirt was found in his luggage. As the prosecutor and the trial court agreed (A. 44), the T-shirt could not be introduced into evidence if respondent admitted that the T-shirt was indeed in his luggage. Respondent, however, denied that the T-shirt was in his luggage, replying: "Not to my knowledge. No" (A. 46). The T-shirt was then introduced in connection with Agent Martinez's rebuttal testimony that the T-shirt was found in respondent's luggage (A. 50-52).

Respondent's position is that the government should not have been permitted to ask about the cut-up T-shirt, or at least that it was not entitled to a truthful answer because the question entered a "forbidden area[ ] (made forbidden by [the government's] own illegal acts) on cross-examination" (Br. 21). We disagree. When a defendant takes the stand, he is obligated to respond truthfully to proper cross-examination questions. When he does not respond truthfully, the government must be permitted to introduce evidence that impeaches his testimony, even if that evidence could not be used in its case-in-chief.[2]

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[2]Respondent suggests (Br. 20 n.12) that this rule will encourage officers to maintain files of illegally seized evidence in the expectation of using the evidence for impeachment at some future time. This rather far-fetched objection is equally pertinent if illegally seized evidence may be used only to impeach direct testimony, the rule for which respondent is arguing. In any event, this objection is without substance. Any person whose property has been illegally seized may defeat the creation of such a "file" by making a motion for the return of his property (other than contraband) under Rule 41(e) of the Federal Rules of Criminal Procedure.

2. Respondent also asserts (Br. 17-18) that his denial that the cut-up T-shirt was in his luggage when he entered the country on October 2, 1977, was not clearly inconsistent with the suppressed evidence because he testified only that he had no knowledge that the T-shirt was in his luggage until October 3, 1977, when he went to pick up his luggage on his way back to Indiana and Agent Martinez pulled the T-shirt out of the luggage (A. 47, 49). Agent Martinez, however, testified that the T-shirt was found on October 2, 1977, when the suitcase was opened in respondent's presence (A. 50-52).[3] This discrepancy between Martinez's testimony and respondent's was not "trivial" (Br. 18 n.10), but went to the heart of respondent's defense. The government was seeking to impeach respondent's denial of involvement with the pocketed T-shirt (and therefore with the cocaine smuggling) by showing that respondent possessed the cut-up T-shirt. Respondent acknowledged that he had packed his own suitcase (A. 49), but in denying that he saw the cut-up T-shirt until the day after his arrest he clearly implied, as the trial judge recognized (A. 48), that the T-shirt was placed in his luggage by the agents. The fact that the T-shirt was actually discovered in respondent's presence when the suitcase was first opened refuted this suggestion and strongly impeached respondent's denial of involvement with the pocketed T-shirt.[4]

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[3]It was this search of the contents of the suitcase on October 2 in respondent's presence that was held to be illegal (Transcript of Suppression Hearing 21, 51).

[4]Indeed, although the record is not clear as to whether the suitcase was locked, respondent testified at the suppression hearing that he himself opened the suitcase for the agents (Transcript of Suppression Hearing 51).

It is of course conceivable that respondent testified truthfully both in denying any involvement in the smuggling and in denying any knowledge of the presence of the T-shirt in his luggage when he arrived in Miami from Peru. Perhaps the agents planted it there afterwards, or perhaps, while they were packing to leave Peru, McLeroth hid it in his suitcase when he was not looking. But that is almost always true of any impeachment evidence. Impeachment is allowed so long as the evidence has a substantial tendency to contradict the witness's testimony, and it is for the jury to determine the weight to give the impeaching evidence.

Here, under ordinary evidentiary principles, respondent's testimony was clearly subject to impeachment by the evidence of the discovery of the T-shirt in his luggage. The district court so found (A. 48), and the court of appeals did not suggest otherwise. Nor do we understand respondent to deny that the impeachment would have been entirely proper but for the fact that the T-shirt was discovered in an illegal search. Under such circumstances, the government should be permitted to impeach the defendant's testimony with evidence that strongly suggests (even if it does not irrefutably prove) the falsity of that testimony. If the defendant can explain the impeachment evidence to the satisfaction of the jury, then its admission will not in the end prejudice him.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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